

PART 4 FINAL INSTRUCTIONS: ELEMENTS OF SPECIFIC CRIMES
[Organized by Statutory Citation]

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G. Offenses Under Title 46

4.46.1903 Possessing a Controlled Substance on Board a Vessel Subject to United States
Jurisdiction with Intent to Distribute, 46 U.S.C. App. § 1903 [Updated: 2/11/03]

[Defendant] is charged with knowingly entering into marriage for the purpose of evading the immigration laws. It is against federal law to engage in such conduct. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that [defendant] knowingly married a United States citizen; and

Second, that [he/she] knowingly entered into the marriage for the purpose of evading a provision of the United States immigration laws.

The word “knowingly” means that the act was done voluntarily and intentionally and not because of mistake or accident.

To evade a provision of law means to escape complying with the law by means of trickery or deceit.

Comment

The validity of the marriage is immaterial. Lutwak v. United States, 344 U.S. 604, 611 (1953).

[Defendant] is charged with [re-entering; attempting to re-enter] the United States after being deported. It is unlawful to engage in such conduct. For you to find [defendant] guilty of this offense, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] was an alien at the time of the alleged offense;

Second, that [defendant] had previously been deported;

Third, that [defendant] [re-entered; was found in; attempted to re-enter] the United States; and

Fourth, that [defendant] had not received the express consent of the Attorney General of the United States to apply for re-admission to the United States since the time of [his/her] previous arrest and deportation.

An “alien” is someone who is neither a citizen nor a national of the United States. A national is someone who is a citizen of the United States or someone who, although not a citizen, owes permanent allegiance to the United States.

“Re-enter” means to be physically present in the United States and free from official restraint.

Comment

(1) The First Circuit recently stated that the second element of the offense includes proving that the defendant had previously been *arrested* in addition to deported. United States v. Cabral, 252 F.3d 520, 522 (1st Cir. 2001). That seems incorrect: a 1996 amendment eliminated the statute’s reference to arrest.

(2) Specific intent to reenter the United States is not an element of the completed reentry offense. United States v. Soto, 106 F.3d 1040, 1041 (1st Cir. 1997). Although the First Circuit initially seemed skeptical that specific intent is an element of the *attempted* reentry offense, see Cabral, 252 F.3d at 523-24, it has recently explicitly stated that attempt “is a specific intent crime in the sense that an ‘attempt to enter’ requires a subjective intent on the part of the defendant to achieve entry into the United States as well as a substantial step toward completing that entry.” United States v. DeLeon, 270 F.3d 90, 92 (1st Cir. 2001). Other circuits are divided. See United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1196 (9th Cir. 2000), for possible instruction language for attempt. “[T]here is no requirement that the defendant additionally knows that what he proposes to do—*i.e.*, attempt to enter the United States—is for him criminal conduct.” DeLeon, 270 F.3d at 92.

(3) Section 1326(b) provides greater penalties for re-entry by certain aliens, including those previously convicted of certain offenses. The fact of the prior conviction is not an element of the

offense, but rather a sentencing factor. Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998); accord United States v. Johnstone, 251 F.3d 281 (1st Cir. 2001) (doubting that the logic of Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), applies to section 1326(b) because Apprendi carved out an exception for “the fact of a prior conviction,” but not deciding the issue); United States v. Latorre-Benavides, 241 F.3d 262, 264 (2d Cir. 2001) (holding that Apprendi did not overrule Almendarez-Torres); United States v. Pacheco-Zepeda, 234 F.3d 411, 414-15 & n.4 (9th Cir. 2000) (same but noting that “[i]f the views of the Supreme Court's individual Justices and the composition of the Court remain the same, Almendarez-Torres may eventually be overruled”).

(4) In addition to proscribing re-entry and attempted re-entry by aliens after they have been deported, the statute also proscribes re-entry and attempted re-entry by aliens after they have been denied admission, excluded, or removed from the United States, and after they have “departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter.” The relevant occurrence can be substituted for deportation in the instruction.

(5) The definition of “re-enter” comes from Gracidas-Ulibarry, 231 F.3d at 1191 n.3. The definition of “alien” comes from 8 U.S.C. § 1101(a)(3) (1999), and the definition of “national” comes from 8 U.S.C. § 1101(a)(22)(B) (1999).

(6) The Immigration and Naturalization Service can grant consent to apply for re-admission in the Attorney General’s place. That can be explained to the jury in appropriate cases. United States v. Ramirez-Cortez, 213 F.3d 1149, 1158-59 (9th Cir. 2000).

(7) The attempt crime can occur outside of the United States. DeLeon, 270 F.3d at 93. For a discussion of whether it can occur wholly inside foreign territory, see id.

4.16.3372**Receiving Fish, Wildlife, Plants Illegally Taken (Lacey Act),
16 U.S.C. §§ 3372(a)(2)(A), 3373(d)(1)(B), (2)**

[Updated: 6/14/02]

[Defendant] is charged with knowingly [importing; exporting; transporting; selling; receiving; acquiring; purchasing] in interstate or foreign commerce [fish; wildlife; plants] whose market value exceeded \$350, knowing that these [fish; wildlife; plants] had been [taken; possessed; transported; sold] in violation of [state] law. It is against federal law to engage in such conduct. For you to find [defendant] guilty of this crime you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] [imported; exported; transported; sold; received; acquired; purchased] in interstate or foreign commerce [fish; wildlife; plants] [taken; possessed; transported sold] in violation of [state] law;

Second, that [defendant] did so knowingly;

Third, that this conduct involved the [sale; purchase; offer to sell; offer to purchase; intent to sell; intent to purchase] [fish; wildlife; plants] with a market value over \$350; and

Fourth, that [defendant] knew that the [fish; wildlife; plants] were [taken; possessed; transported; sold] in violation of [state] law.

[State] law prohibits a person from [describe illegal conduct].

“Knowingly” means that the act was done voluntarily and intentionally and not because of mistake or accident.

Interstate commerce includes the transportation of [fish; wildlife; plants] between one state and another state.

“Market value” is the price that a willing buyer would pay a willing seller.

The government does not have to prove that [defendant] knew of the existence of the federal law under which [he/she] has been charged. The government also does not have to prove that [defendant] was the person who illegally took the [fish; wildlife; plants] from [state]. The government does not have to prove that [defendant] knew all the details of [state] law or the details of how the [fish; wildlife; plants] were taken. The government must prove beyond a reasonable doubt that [defendant] knew that the [fish; wildlife; plants] had been in some fashion taken or possessed in violation of [state] law.

LESSER OFFENSE

If you conclude that the government has proven beyond a reasonable doubt all the elements of the offense except the market value in excess of \$350, you may convict [defendant] of a lesser offense under this Count. Alternatively, if you find that the government has proven beyond a reasonable doubt all the elements of the offense except the requirement that [defendant] knew that the [fish; wildlife; plants] had been or were being taken or possessed in violation of [state] law, you may convict [defendant] of a lesser offense under this Count if you find that the government has proven beyond a reasonable doubt that in the exercise of due care [defendant] should have known that the [fish; wildlife; plants] were [taken; possessed; transported; sold] in violation of [state] law.

Comment

(1) The Lacey Act is broader than this instruction, but this instruction attempts to set forth the felony offense under § 3373(d)(1)(B)(2). A lesser included charge is also provided in the event the government fails to prove the \$350 minimum or the requisite degree of scienter. The Lacey Act is also broad enough to include other misdemeanor charges, but they do not seem to qualify as lesser included offenses.

(2) The definition of “market value” is supported by United States v. Stenberg, 803 F.2d 422, 433 (9th Cir. 1986), superseded by statute on other grounds as recognized in United States v. Atkinson, 966 F.2d 1270, 1273 n.4 (9th Cir. 1992).

(3) United States v. Todd, 735 F.2d 146, 151 (5th Cir. 1984), supports the proposition that the government need not prove that the defendant knew about the Lacey Act, only that the defendant knew that the (in that case) game was illegally taken.

(4) Definitions of various terms, such as “fish,” “wildlife,” “plants,” “import,” “taken” and “transport” are contained in 16 U.S.C. § 3371.

4.18.00

Attempt

[Updated: 6/14/02]

In order to carry its burden of proof for the crime of attempt to [_____] as charged in Count [____] of the indictment, the government must prove the following two things beyond a reasonable doubt:

First, that [defendant] intended to commit the crime of [____]; and

Second, that [defendant] engaged in a purposeful act that, under the circumstances as [he/she] believed them to be, amounted to a substantial step toward the commission of that crime and strongly corroborated [his/her] criminal intent.

A “substantial step” is an act in furtherance of the criminal scheme. A “substantial step” must be something more than mere preparation, but less than the last act necessary before the substantive crime is completed.

The “substantial step” may itself prove the intent to commit the crime, but only if it unequivocally demonstrates such an intent.

Comment

(1) “There is no general federal statute which proscribes the attempt to commit a criminal offense. Thus, attempt is actionable only where a specific criminal statute outlaws both its actual as well as its attempted violation.” United States v. Rivera-Sola, 713 F.2d 866, 869 (1st Cir. 1983). An attempt offense may be incorporated into a particular statute, e.g., 18 U.S.C. § 2113(a) (bank robbery), or set forth in a separate statute, e.g., 21 U.S.C. § 846 (attempted drug possession).

(2) Although “[t]here is no statutory definition of attempt anywhere in the federal law,” the First Circuit has adopted the Model Penal Code standard. United States v. Dworken, 855 F.2d 12, 16-17 (1st Cir. 1988) (applying Model Penal Code § 5.01(1)(c) to attempt under federal drug law, 21 U.S.C. § 846); accord United States v. Doyon, 194 F.3d 207, 210 (1st Cir. 1999) (applying Model Penal Code definition of attempt).

(3) The Model Penal Code’s standard for attempt covers acts *or omissions*. Model Penal Code § 5.01(1)(c). Because the First Circuit has only dealt with “overt act” cases to date, see e.g., United States v. George, 752 F.2d 749, 756 (1st Cir. 1985); Rivera-Sola, 713 F.2d at 869, it has not had occasion to address circumstances under which an omission could amount to a substantial step.

(4) Under the Model Penal Code, a defendant commits an attempt if he or she performs an act that, “under the circumstances as he[*/she*] believes them to be,” constitutes a substantial step toward commission of a crime. Model Penal Code § 5.01(1)(c); see also Dworken, 855 F.2d at 19. Factual impossibility is not a defense to the charge of attempt. See United States v. Medina-Garcia, 918 F.2d 4, 8 (1st Cir. 1990).

(5) “If the substantial steps are themselves the sole proof of the criminal intent, then those steps unequivocally must evidence such an intent; that is, it must be clear that there was a criminal design and that the intent was *not* to commit some non-criminal act.” Dworken, 855 F.2d at 17; see also United States v. Levy-Cordero, 67 F.3d 1002, 1019 (1st Cir. 1995) (discussing the substantial step requirement); Rivera-Sola, 713 F.2d at 869-70 (same). On the other hand, “[i]f there is separate evidence of criminal intent independent from that provided by the substantial steps (e.g., a confessed admission of a design to commit a crime), then substantial steps . . . must *merely* corroborate that intent.” Dworken, 855 F.2d at 17 n.3 (emphasis added).

To “aid and abet” means intentionally to help someone else commit a crime. To establish aiding and abetting, the government must prove beyond a reasonable doubt:

First, that someone else committed the charged crime; and

Second, that [defendant] consciously shared the other person’s knowledge of the underlying criminal act, intended to help [him/her], and [willfully] took part in the endeavor, seeking to make it succeed.

[Defendant] need not perform the underlying criminal act, be present when it is performed, or be aware of the details of its execution to be guilty of aiding and abetting. But a general suspicion that an unlawful act may occur or that something criminal is happening is not enough. Mere presence at the scene of a crime and knowledge that a crime is being committed are also not sufficient to establish aiding and abetting.

[An act is done “willfully” if done voluntarily and intentionally with the intent that something the law forbids be done—that is to say with bad purpose, either to disobey or disregard the law.]

Comment

(1) This instruction is based on United States v. Spinney, 65 F.3d 231, 234-35 (1st Cir. 1995), and United States v. Loder, 23 F.3d 586, 590-91 (1st Cir. 1994).

(2) “[A] fair reading of Spinney supports the proposition that the level of knowledge required to support an aiding and abetting conviction is related to the specificity of the principal offense, as to both *mens rea* and *actus reus*.” United States v. Rosario-Diaz, 202 F.3d 54, 63 (1st Cir. 2000). For aiding and abetting the use of a firearm in a crime of violence, Instruction 4.18.924(c), the level is knowledge “to a practical certainty.” Id. For aiding and abetting an armed bank robbery, it is “notice of the likelihood” that the principal would use a dangerous weapon, id., defined as a “reasonable likelihood,” not a “high likelihood,” “low likelihood,” or “semi likelihood.” Id. at 63 n.1. For carjacking, the First Circuit has not decided which standard applies. United States v. Otero-Mendez, 273 F.3d 46, 51-52 (1st Cir. 2001).

(3) The Committee was evenly divided on whether to include the term “willfully” and the bracketed definition. Title 18 U.S.C. § 2 has two subsections, only the first of which, subsection (a), deals specifically with aiding and abetting. Subsection (a) does not require that an aider and abettor act “willfully.” Subsection (b), dealing with one who causes an act to be done which, if performed directly by the accused or another, would be a crime, does require proof of willfulness. Subsection (b), however, did not appear until 1948 and willfulness was not added as a requirement in subsection (b) until 1951. For a good discussion of the legislative history of subsection (b) see United States v. Ruffin, 613 F.2d 408 (2d Cir. 1979), and of subsection (a) see Standefer v. United States, 447 U.S. 10 (1980). First Circuit caselaw has not consistently recognized a difference between the two

subsections, treating them both generically as “aid and abet,” see, e.g., United States v. Footman, 215 F.3d 145, 154 (1st Cir. 2000) (“When aiding and abetting is involved, then, the ‘counsels, commands, induces, or procures’ [§ 2(a)] and ‘cause’ [§ 2(b)] language from § 2 is properly part of the jury’s instruction.”), and at least some First Circuit cases use the term “willfully” when dealing specifically with subsection (a). See, e.g., United States v. O’Campo, 973 F.2d 1015, 1020 (1st Cir. 1992). Complicating matters further, “willfully” is a term subject to a variety of definitions, see Ratzlaf v. United States, 510 U.S. 135, 141 (1994), and it is unclear whether the First Circuit meant to require specific intent (to violate the law) in subsection (a) cases by using the term. Many statutes penalize conduct simply because the defendant undertakes it, regardless of whether the defendant knows that the conduct amounts to a crime (e.g., felon in possession of a firearm, 18 U.S.C. § 922(g)); it is unclear why an aider and abettor should be held to a more demanding intent. In fact, there is language in First Circuit cases supporting the contrary conclusion. In Loder, the court said that “the defendant [must] consciously share the principal’s knowledge of the underlying criminal act,” 23 F.3d at 591, and quoted approvingly the statement in United States v. Valencia, 907 F.2d 671 (7th Cir. 1990): “The state of mind required for conviction as an aider and abettor is the same state of mind as required for the principal offense.” Id. at 680. Finally, the First Circuit at times has recognized that subsection (b) is different from subsection (a), see United States v. Strauss, 443 F.2d 986, 988 (1st Cir. 1971), and has recently held that “[a] defendant may be convicted under this section [b] even though the individual who did in fact commit the substantive act lacked the necessary criminal intent.” United States v. Dodd, 43 F.3d 759, 762 (1st Cir. 1995); accord United States v. Andrade, 135 F.3d 104, 110 (1st Cir. 1998) (“Unlike aiding and abetting liability . . . there is no requirement [under section 2(b)] that the intermediary be shown to be criminally liable.”). If the two subsections are treated as interchangeable, Dodd and Andrade would be inconsistent with Loder’s holding that culpability under (a) requires a shared knowledge of the underlying criminal act between or among the actors. But if (b) is treated separately from (a) as Dodd and Andrade suggest, the willfulness element of (b) becomes a sensible additional requirement of specific intent for culpability of a defendant charged with causing an innocent person to act. Following the logic of Loder, where the underlying criminal act is not a specific intent crime, it may be defensible to leave out “willfully” and its definition in a subsection (a) prosecution.

United States v. Leppo, 177 F.3d 93, 95-97 (1st Cir. 1999), discusses, but does not resolve, disagreement over what “willfulness” requires in a § 2(b) case.

4.18.03

Accessory After the Fact, 18 U.S.C. § 3

[Updated: 6/14/02]

[Defendant] is charged with being an accessory after the fact to the crime of [specify crime]. It is against federal law to be an accessory after the fact. For [defendant] to be convicted of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [specify other person] committed [specify crime];

Second, that [defendant] knew that [specify other person] committed [specify crime]; and

Third, that after the [specify crime] was completed, [defendant] tried to help [specify other person] with the intention of preventing or hindering [his/her] [arrest; trial; punishment].

Knowledge and intent may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] knew or intended at a particular time, you may consider any statements made or acts done or omitted by [defendant] and all other facts and circumstances received in evidence that may aid in your determination of [defendant]'s knowledge or intent. You may infer, but you are certainly not required to infer, that a person intends the natural and probable consequences of acts knowingly done or omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

Comment

(1) The First Circuit has said that “an accessory-after-the-fact offense is almost never going to be a lesser included offense as to the principal crime” because it requires proof of one element the principal offense does not require—assistance after the crime was committed. United States v. Rivera-Figueroa, 149 F.3d 1, 6 & n.5 (1st Cir. 1998). If the defendant has not been charged as an accessory-after-the-fact, giving this charge, even at a defendant’s request, has “the potential to confuse the jury.” United States v. Otero-Mendez, 273 F.3d 46, 55 (1st Cir. 2001); accord Rivera-Figueroa, 149 F.3d at 7.

(2) The statute requires knowledge “that an offense against the United States has been committed.” That means that the “government must prove beyond a reasonable doubt that the accessory was aware that the offender had engaged in conduct that satisfies the essential elements of the primary federal offense,” but not necessarily that the defendant knew that such conduct was in fact a federal crime. United States v. Graves, 143 F.3d 1185, 1186 (9th Cir. 1998).

4.18.152(1) Bankruptcy Fraud, Concealment, 18 U.S.C. § 152(1)

[Updated: 6/14/02]

[Defendant] is charged with bankruptcy fraud through concealment. It is against federal law to commit bankruptcy fraud through concealment. For you to find [defendant] guilty of this offense, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that a proceeding in bankruptcy existed;

Second, that [defendant] concealed [property description] from [e.g., bankruptcy trustee; creditors; United States Trustee];

Third, that [defendant] did so knowingly and fraudulently; and

Fourth, that the [property description] belonged to [the debtor's estate].

“Conceal” means to hide, withhold information about, or prevent disclosure or recognition of something.

A “debtor” is the person concerning whom a bankruptcy case is filed.

A “debtor’s estate” is created by the filing of a bankruptcy petition.

“Property of the debtor’s estate” consists of (1) all property owned by the debtor at the time the bankruptcy petition is filed, (2) all proceeds or profits from such property, and (3) any property that the estate thereafter acquires.

A “creditor” is a person or company that has a claim or a right to payment from the debtor that arose at the time, or before, the bankruptcy court issued its order for relief concerning the debtor.

A “bankruptcy trustee” is an individual who is appointed to oversee bankruptcy cases.

The “United States Trustee” is an individual appointed by, and who acts under the general supervision of, the Attorney General of the United States who oversees cases and bankruptcy trustees.

A defendant acted “fraudulently” if he or she acted willfully and with the intent to deceive or cheat. Thus, if a defendant acted in good faith, he or she cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

“Willfully” means voluntarily and intentionally and with the specific intention to do something the law forbids, or with the specific intention to fail to do something the law requires, that is to say with bad purpose, either to disobey or disregard the law.

A defendant acted “knowingly” if he or she was conscious and aware of his or her actions, realized what he or she was doing or what was happening around him or her, acted voluntarily and intentionally, and did not act because of ignorance, mistake or accident.

Comment

- (1) The government need not prove that a substantial amount of estate property was concealed, although a *de minimis* value “may be probative evidence of the absence of an intent to defraud.” United States v. Grant, 971 F.2d 799, 809 & n.19 (1st Cir. 1992).
- (2) The First Circuit approved defining “knowingly” and “fraudulently” in the bankruptcy fraud context “through direct reference to the voluntariness, as well as the general and specific intent animating [the defendant’s] conduct.” United States v. Shadduck, 112 F.3d 523, 527 (1st Cir. 1997).
- (3) Concerning “property of the estate,” “[t]he determination whether a debtor had a legal, equitable, or possessory interest in property at the commencement of the case requires the factfinder to evaluate all relevant direct and circumstantial evidence relating to the property and to the intent of the debtor.” Grant, 971 F.2d at 806.
- (4) Concerning fraudulent intent, replacement of removed property may be probative of fraudulent intent, but not dispositive. Grant, 971 F.2d at 808.
- (5) According to United States v. Cardall, 885 F.2d 656, 678 (10th Cir. 1989), it is not always necessary to use the words “legal or equitable interest” in describing the debtor’s estate.

**4.18.152(2),(3) Bankruptcy Fraud, False Oath/Account and False Declaration,
18 U.S.C. § 152(2), 152(3)**

[Updated: 2/11/03]

[Defendant] is charged with bankruptcy fraud by making a false oath/account [false declaration]. It is against federal law to commit bankruptcy fraud by making a false oath/account [false declaration]. For you to find [defendant] guilty of this offense, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that a proceeding in bankruptcy existed;

Second, that [defendant] made a statement or series of statements under oath [declaration or statement under penalty of perjury] in relation to the bankruptcy proceeding. You must be unanimous on which statement or series of statements [declaration] it is;

Third, that the statement or series of statements [declaration] concerned a material fact;

Fourth, that the statement or series of statements [declaration] was false; and

Fifth, that [defendant] made the statement or series of statements knowingly and fraudulently.

As long as the statement or series of statements [declaration] is literally true, there can be no conviction.

[A “declaration” is a statement or narration of facts.]

A “material” fact is one that has a natural tendency to influence or be capable of influencing the decision of the decisionmaker to whom it was addressed.

A defendant acted “fraudulently” if he or she acted willfully and with intent to deceive or cheat. Thus, if a defendant acted in good faith, he or she cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

“Willfully” means voluntarily and intentionally and with the specific intention to do something the law forbids, or with the specific intention to fail to do something the law requires, that is to say with bad purpose, either to disobey or disregard the law.

A defendant acted “knowingly” if he or she was conscious and aware of his or her actions, realized what he or she was doing or what was happening around him or her, acted voluntarily and intentionally, and did not act because of ignorance, mistake or accident.

Comment

(1) “To support a conviction for making a false oath in bankruptcy under 18 U.S.C. § 152(2) the prosecution is required to establish (1) the existence of bankruptcy proceedings; (2) that a false statement was made in the proceedings under penalty of perjury; (3) as to a material fact; and (4) that the statement was knowingly and fraudulently made.” United States v. Cutter, 313 F.3d 1, 4 n.4 (1st Cir. 2002).

(2) The First Circuit approved defining “knowingly” and “fraudulently” in the bankruptcy fraud context “through direct reference to the voluntariness, as well as the general and specific intent animating [the defendant’s] conduct.” United States v. Shaddock, 112 F.3d 523, 527 (1st Cir. 1997). Defining “knowingly and fraudulently” in terms of intent to deceive is supported by United States v. Gellene, 182 F.3d 578, 586-87 (7th Cir. 1999).

(3) When materiality is an element of the offense, it is for the jury. See United States v. Gaudin, 515 U.S. 506, 522-23 (1995) (holding that it was error for the trial judge to refuse to submit the question of materiality to the jury in a case in which the respondent had been convicted of making material false statements in a matter within the jurisdiction of a federal agency, in violation of 18 U.S.C. § 1001). Material misrepresentations include not only those that relate to the assets of the bankruptcy estate, but any that relate to “some significant aspect of the bankruptcy case or proceeding in which it was given.” Gellene, 182 F.3d at 588 (quoting 1 Collier on Bankruptcy ¶ 7.02[2][a][iv], at 7-46 to 7-47 (Lawrence P. King ed., 15th ed. rev. 1999)).

(4) Other circuits have held that omissions of material facts can be false statements. Unites States v. Sobin, 56 F.3d 1423, 1428 (D.C. Cir. 1995); United States v. Ellis, 50 F.3d 419, 423-25 (7th Cir. 1995); United States v. Lindholm, 24 F.3d 1078, 1083-85 (9th Cir. 1994).

(5) Literal truth is a complete defense to a false oath claim. Bronston v. United States, 409 U.S. 352, 362 (1973) (criminal perjury statute); United States v. Moynagh, 566 F.2d 799, 804 (1st Cir. 1977) (dismissing charge for false statement where omission was warranted by facts and truthful), abrogated on other grounds by United States v. Nieves-Burgos, 62 F.3d 431, 436-37 (1st Cir. 1995).

4.18.152(4)**Bankruptcy Fraud, False Claim, 18 U.S.C. § 152(4)**

[Updated: 6/14/02]

[Defendant] is charged with bankruptcy fraud by making a false claim. It is against federal law to commit bankruptcy fraud by making a false claim. For you to find [defendant] guilty of this offense, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that a proceeding in bankruptcy existed;

Second, that [defendant] presented or caused to be presented, or used or caused to be used, a claim for proof against the bankruptcy estate;

Third, that the claim as presented or used was false; and

Fourth, that [defendant] did so knowingly and fraudulently.

A “bankruptcy estate” is created by the filing of a bankruptcy petition. It includes all property in which the debtor had an interest on the date of the commencement of the bankruptcy.

A claim for proof is sometimes also called a “proof of claim.” It is a written statement setting forth a creditor’s claim against the estate of a debtor. A proof of claim is “presented” or “used” if it appears in a debtor’s bankruptcy schedules, unless it is listed as disputed, contingent or unliquidated.

A defendant acted “fraudulently” if he or she acted willfully and with the intent to deceive or cheat. Thus, if a defendant acted in good faith, he or she cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

“Willfully” means voluntarily and intentionally and with the specific intention to do something the law forbids, or with the specific intention to fail to do something the law requires, that is to say with bad purpose, either to disobey or disregard the law.

A defendant acted “knowingly” if he or she was conscious and aware of his or her actions, realized what he or she was doing or what was happening around him or her, acted voluntarily and intentionally, and did not act because of ignorance, mistake or accident.

Comment

The First Circuit approved defining “knowingly” and “fraudulently” in the bankruptcy fraud context “through direct reference to the voluntariness, as well as the general and specific intent animating [the defendant’s] conduct.” United States v. Shadduck, 112 F.3d 523, 527 (1st Cir. 1997).

4.18.152(5)**Bankruptcy Fraud, Receipt with Intent to Defraud,
18 U.S.C. § 152(5)**

[Updated: 6/14/02]

[Defendant] is charged with bankruptcy fraud by receiving property from a bankruptcy debtor with intent to defeat the provisions of bankruptcy law. It is against federal law to commit bankruptcy fraud in this manner. For you to find [defendant] guilty of this offense, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that a proceeding in bankruptcy existed;

Second, that [defendant] received a material amount of [property] after the bankruptcy case was filed;

Third, that [defendant] received the property from the debtor;

Fourth, that [defendant] received such property knowingly and fraudulently; and

Fifth, that [defendant] intended to defeat the provisions of bankruptcy law.

Bankruptcy law provisions are designed to promote efficient bankruptcy administration and a fair distribution of a debtor's assets to creditors. This is accomplished by allowing the trustee to make a neutral and informed assessment of the status and value of the debtor's property interests, of whatever sort. For the purposes of this case, bankruptcy law provisions are defeated when a person without the trustee's approval acts in a manner that diminishes the debtor's assets and thus interferes with their fair distribution.

"Material amount" means a significant—not an incidental—amount.

A defendant acted "fraudulently" if he or she acted willfully and with the intent to deceive or cheat. Thus, if a defendant acted in good faith, he or she cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

"Willfully" means voluntarily and intentionally and with the specific intention to do something the law forbids, or with the specific intention to fail to do something the law requires, that is to say with bad purpose, either to disobey or disregard the law.

A defendant acted "knowingly" if he or she was conscious and aware of his or her actions, realized what he or she was doing or what was happening around him or her, acted voluntarily and intentionally, and did not act because of ignorance, mistake or accident.

Comment

- (1) Unlike the other section 152 subsections, this one contains an express materiality requirement.
- (2) The First Circuit approved defining “knowingly” and “fraudulently” in the bankruptcy fraud context “through direct reference to the voluntariness, as well as the general and specific intent animating [the defendant’s] conduct.” United States v. Shadduck, 112 F.3d 523, 527 (1st Cir. 1997).

[Defendant] is charged with bankruptcy fraud by [giving; offering; receiving; attempting to obtain] any [money; property; remuneration; compensation; reward; advantage; promise] for [acting; forbearing from acting] in a proceeding in bankruptcy. It is against federal law to commit bankruptcy fraud in this manner. For you to find [defendant] guilty of this offense, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that a proceeding in bankruptcy existed;

Second, that [defendant] [gave; offered; received; attempted to obtain] [to; from] [specify other person] any [money; property; remuneration; compensation; reward; advantage; promise] after the bankruptcy case was filed;

Third, that [defendant] did this to get [specify other person] to [take; forbear from taking] some action in the bankruptcy proceeding; and

Fourth, that [defendant] did so knowingly and fraudulently.

A defendant acted “fraudulently” if he or she acted willfully and with the intent to deceive or cheat. Thus, if a defendant acted in good faith, he or she cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

“Willfully” means voluntarily and intentionally and with the specific intention to do something the law forbids, or with the specific intention to fail to do something the law requires, that is to say with bad purpose, either to disobey or disregard the law.

A defendant acted “knowingly” if he or she was conscious and aware of his or her actions, realized what he or she was doing or what was happening around him or her, acted voluntarily and intentionally, and did not act because of ignorance, mistake or accident.

To “forbear” means to refrain from enforcing a right, obligation, or debt.

Comment

(1) The First Circuit approved defining “knowingly” and “fraudulently” in the bankruptcy fraud context “through direct reference to the voluntariness, as well as the general and specific intent animating [the defendant’s] conduct.” United States v. Shadduck, 112 F.3d 523, 527 (1st Cir. 1997).

(2) The definition of “forbear” is from Black’s Law Dictionary 656 (7th ed. 1999). The bankruptcy code does not define the term.

4.18.152(7)**Bankruptcy Fraud, Transfer of Property in Personal Capacity or as Agent or Officer, 18 U.S.C. § 152(7)**

[Updated: 6/14/02]

[Defendant] is charged with bankruptcy fraud by transferring or concealing [his/her] [property; the property of [specify third person or corporation] for whom [he/she] was acting as an agent or officer] [in contemplation of bankruptcy; with intent to defeat the provisions of the bankruptcy law]. It is against federal law to commit bankruptcy fraud in this manner. For you to find [defendant] guilty of this offense, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] transferred or concealed [funds; property] in [his/her] personal capacity; as an officer or agent of [specify third party or corporation]];

Second, that the [funds; property] belonged to [defendant; a third person; a corporation for whom [defendant] was an agent or officer];

Third, that [defendant] did so knowingly and fraudulently; and

Fourth, that [defendant] did so [in contemplation of bankruptcy; with the intent to defeat the provisions of bankruptcy law].

[“In contemplation of bankruptcy” means in expectation of, or planning for, the future probability of a bankruptcy proceeding.]

[Bankruptcy law provisions are designed to promote efficient bankruptcy administration and a fair distribution of a debtor’s assets to creditors. This is accomplished by allowing the trustee to make a neutral and informed assessment of the status and value of the debtor’s property interests, of whatever sort. For the purposes of this case, bankruptcy law provisions are defeated when a person without the trustee’s approval acts in a manner that diminishes the debtor’s assets and thus interferes with their fair distribution.]

“Transfer” means move property from one place to another or change the title of property so that someone else owns it.

“Conceal” means to hide, withhold information about, or prevent disclosure or recognition of something.

A defendant acted “fraudulently” if he or she acted willfully and with the intent to deceive or cheat. Thus, if a defendant acted in good faith, he or she cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

“Willfully” means voluntarily and intentionally and with the specific intention to do something the law forbids, or with the specific intention to fail to do something the law requires, that is to say with bad purpose, either to disobey or disregard the law.

A defendant acted “knowingly” if he or she was conscious and aware of his or her actions, realized what he or she was doing or what was happening around him or her, acted voluntarily and intentionally, and did not act because of ignorance, mistake or accident.

Comment

The First Circuit approved defining “knowingly” and “fraudulently” in the bankruptcy fraud context “through direct reference to the voluntariness, as well as the general and specific intent animating [the defendant’s] conduct.” United States v. Shadduck, 112 F.3d 523, 527 (1st Cir. 1997).

4.18.152(8)**Bankruptcy Fraud, False Entries, 18 U.S.C. § 152(8)**

[Updated: 6/14/02]

[Defendant] is charged with bankruptcy fraud by knowingly and fraudulently concealing, destroying, mutilating, falsifying or making false entries in recorded information relating to the property and financial affairs of a debtor [after the bankruptcy case was filed; in contemplation of bankruptcy]. It is against federal law to commit bankruptcy fraud in this manner. For you to find [defendant] guilty of this offense, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [a proceeding in bankruptcy existed; a bankruptcy proceeding was contemplated];

Second, that [defendant] concealed or falsified or made false entries in recorded information as charged;

Third, that the recorded information related to the property or financial affairs of a debtor; and

Fourth, that [defendant] did so knowingly and fraudulently.

“In contemplation of bankruptcy” means in expectation of, or planning for, the future probability of a bankruptcy proceeding.

“Recorded information” includes books, documents, records and papers.

“Conceal” means to hide, withhold information about, or prevent disclosure or recognition of something.

A defendant acted “fraudulently” if he or she acted willfully and with the intent to deceive or cheat. Thus, if a defendant acted in good faith, he or she cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

“Willfully” means voluntarily and intentionally and with the specific intention to do something the law forbids, or with the specific intention to fail to do something the law requires, that is to say with bad purpose, either to disobey or disregard the law.

A defendant acted “knowingly” if he or she was conscious and aware of his or her actions, realized what he or she was doing or what was happening around him or her, acted voluntarily and intentionally, and did not act because of ignorance, mistake or accident.

Comment

The First Circuit approved defining “knowingly” and “fraudulently” in the bankruptcy fraud context “through direct reference to the voluntariness, as well as the general and specific intent animating [the defendant’s] conduct.” United States v. Shadduck, 112 F.3d 523, 527 (1st Cir. 1997).

4.18.152(9)**Bankruptcy Fraud, Withholding Recorded Information,
18 U.S.C. § 152(9)**

[Updated: 6/14/02]

[Defendant] is charged with bankruptcy fraud by knowingly and fraudulently withholding from the bankruptcy trustee, after the bankruptcy was filed, recorded information relating to the property and financial affairs of a debtor.

Where a bankruptcy trustee has been appointed, a debtor must (1) cooperate with the trustee to enable the trustee to perform the trustee's duties and (2) surrender to the trustee all property of the estate and any recorded information, including books, documents, records and papers relating to property of the estate.

It is against federal law to commit bankruptcy fraud by knowingly and fraudulently withholding from the bankruptcy trustee, after the bankruptcy was filed, recorded information relating to the property and financial affairs of a debtor. For you to find [defendant] guilty of this offense, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that a proceeding in bankruptcy existed;

Second, that the trustee was entitled to possession of the recorded information;

Third, that [defendant] withheld from the trustee the recorded information after the bankruptcy was filed;

Fourth, that the recorded information related to the property or financial affairs of a debtor;
and

Fifth, that [defendant] did so knowingly and fraudulently.

A "bankruptcy trustee" is an individual who is appointed to oversee bankruptcy cases.

"Recorded information" includes books, documents, records and papers.

A defendant acted "fraudulently" if he or she acted willfully and with the intent to deceive or cheat. Thus, if a defendant acted in good faith, he or she cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

"Willfully" means voluntarily and intentionally and with the specific intention to do something the law forbids, or with the specific intention to fail to do something the law requires, that is to say with bad purpose, either to disobey or disregard the law.

A defendant acted "knowingly" if he or she was conscious and aware of his or her actions, realized what he or she was doing or what was happening around him or her, acted voluntarily and intentionally, and did not act because of ignorance, mistake or accident.

Comment

The First Circuit approved defining “knowingly” and “fraudulently” in the bankruptcy fraud context “through direct reference to the voluntariness, as well as the general and specific intent animating [the defendant’s] conduct.” United States v. Shadduck, 112 F.3d 523, 527 (1st Cir. 1997).

[Defendant] is accused of conspiring to commit a federal crime— specifically, the crime of [insert crime]. It is against federal law to conspire with someone to commit this crime.

For you to find [defendant] guilty of conspiracy, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that the agreement specified in the indictment, and not some other agreement or agreements, existed between at least two people to [substantive crime]; and

Second, that [defendant] willfully joined in that agreement; [and

Third, that one of the conspirators committed an overt act during the period of the conspiracy in an effort to further the purpose of the conspiracy.]

A conspiracy is an agreement, spoken or unspoken. The conspiracy does not have to be a formal agreement or plan in which everyone involved sat down together and worked out all the details.

But the government must prove beyond a reasonable doubt that those who were involved shared a general understanding about the crime. Mere similarity of conduct among various people, or the fact that they may have associated with each other or discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy, but you may consider such factors.

To act “willfully” means to act voluntarily and intelligently and with the specific intent that the underlying crime be committed—that is to say, with bad purpose, either to disobey or disregard the law—not to act by ignorance, accident or mistake. The government must prove two types of intent beyond a reasonable doubt before [defendant] can be said to have willfully joined the conspiracy: an intent to agree and an intent, whether reasonable or not, that the underlying crime be committed. Mere presence at the scene of a crime is not alone enough, but you may consider it among other factors. Intent may be inferred from the surrounding circumstances.

Proof that [defendant] willfully joined in the agreement must be based upon evidence of [his/her] own words and/or actions. You need not find that [defendant] agreed specifically to or knew about all the details of the crime, or knew every other co-conspirator or that [he/she] participated in each act of the agreement or played a major role, but the government must prove beyond a reasonable doubt that [he/she] knew the essential features and general aims of the venture. Even if [defendant] was not part of the agreement at the very start, [he/she] can be found guilty of conspiracy if the government proves that [he/she] willfully joined the agreement later. On the other hand, a person who has no knowledge of a conspiracy, but simply happens to act in a way that furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

[An overt act is any act knowingly committed by one or more of the conspirators in an effort to accomplish some purpose of the conspiracy. Only one overt act has to be proven. The government is

not required to prove that [defendant] personally committed or knew about the overt act. It is sufficient if one conspirator committed one overt act at some time during the period of the conspiracy.]

The government does not have to prove that the conspiracy succeeded or was achieved. The crime of conspiracy is complete upon the agreement to commit the underlying crime [and the commission of one overt act].

Comment

(1) This charge is based largely upon United States v. Rivera-Santiago, 872 F.2d 1073, 1078-80 (1st Cir. 1989), as modified by United States v. Piper, 35 F.3d 611, 614-15 (1st Cir. 1994). See also United States v. Richardson, 225 F.3d 46, 53 (1st Cir. 2000) (approving Pattern’s statement that proof of willful joinder “must” be based upon evidence of the defendant’s own words and/or actions); United States v. Boylan, 898 F.2d 230, 241-43 (1st Cir. 1990); Blumenthal v. United States, 332 U.S. 539, 557 (1947).

(2) The third element (overt act) is not required in a drug conspiracy under 21 U.S.C. § 846. United States v. Shabani, 513 U.S. 10, 11 (1994). For discussion of overt acts see United States v. Flaherty, 668 F.2d 566, 580 n.4 (1st Cir. 1981).

(3) The Government does not have to prove that the defendant intended to commit the underlying offense himself or herself. Piper, 35 F.3d at 614-15. There must be proof, however, that a second conspirator with criminal intent existed. United States v. Alzanki, 54 F.3d 994, 1003 (1st Cir. 1995).

(4) “Whether there is a single conspiracy, multiple conspiracies, or no conspiracy at all is ordinarily a factual matter for the jury to determine.” United States v. Mena-Robles, 4 F.3d 1026, 1033 (1st Cir. 1993). A multiple conspiracy instruction should be provided if “‘on the evidence adduced at trial, a reasonable jury could find more than one such illicit agreement, or could find an agreement different from the one charged.’” United States v. Brandon, 17 F.3d 409, 449 (1st Cir. 1994) (quoting Boylan, 898 F.2d at 243). The following is appropriate language that the Fifth and Ninth Circuits have used for multiple-conspiracy instructions:

If you find that the conspiracy charged did not exist, then you must return a not guilty verdict, even though you find that some other conspiracy existed. If you find that a defendant was not a member of the conspiracy charged in the indictment, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy.

Fifth Circuit Instruction 2.21; see also Ninth Circuit Instruction 8.17.

(5) The definition of “willfully” comes from United States v. Monteiro, 871 F.2d 204, 208-09 (1st Cir. 1989). For alternate definitions see United States v. Porter, 764 F.2d 1, 17 (1st Cir. 1985), and United States v. Drape, 668 F.2d 22, 26 (1st Cir. 1992). Specific intent is preferred. United States v. Yefsky, 994 F.2d 885, 899 (1st Cir. 1993).

(6) “A conspiracy does not automatically terminate simply because the Government, unbeknownst to some of the conspirators, has ‘defeat[ed]’ the conspiracy’s ‘object.’” United States v. Jimenez Recio, ___ U.S. ___, 154 L.Ed.2d 744, No. 01-1184, 2003 LEXIS 901, at *9 (Jan. 21, 2003). Impossibility is not a defense. United States v. Giry, 818 F.2d 120, 126 (1st Cir. 1987).

(7) A conspiracy to defraud the IRS may present unique problems of “purpose” or “knowledge.” United States v. Goldberg, 105 F.3d 770, 774 (1st Cir. 1997).

(8) Note that some substantive offenses contain their own conspiracy prohibitions. See, e.g., 18 U.S.C. § 241 (civil rights conspiracy) (no overt act required, see United States v. Crochiere, 129 F.3d 233, 237-38 (1st Cir. 1997)); 18 U.S.C. § 1201(c) (kidnapping) (overt act required); 18 U.S.C. § 1951(a) (Hobbs Act) (no overt act required, see United States v. Palmer, 203 F.3d 55, 63 (1st Cir. 2000)).

(9) Withdrawal is not an affirmative defense if the conspiratorial agreement has already been made. United States v. Rogers, 102 F.3d 641, 644 (1st Cir. 1996).

(10) There must be at least two conspirators. In a Mann Act case, “[t]here is an inherent policy judgment in the [statute] not to prosecute women who do no more than consent to being transported across state lines for the purpose of prostitution.” United States v. Footman, 215 F.3d 145, 151 (1st Cir. 2000). If that is all there is, the woman is a victim, not a co-conspirator. “But that policy simply does not apply when the women assume roles in running the business.” Id. “[T]he issue is whether she agreed to further the conspiracy and took steps to do so, beyond her working as a prostitute herself and crossing state lines.” Id.

(11) If the record supports it, the defendant is entitled to an instruction “that a buyer and seller in a single drug transaction are not invariably part of a drug conspiracy. The classic example is a single sale for personal use and without prearrangement.” United States v. Martinez-Medina, 279 F.3d 105, 120 (1st Cir. 2002) (citing United States v. Moran, 984 F.2d 1299, 1302-04 (1st Cir. 1993)).

(12) The First Circuit has not decided whether the jury must be unanimous on one specific criminal object of a multi-object conspiracy. United States v. Marino, 277 F.3d 11, 32 (1st Cir. 2002).

(13) See Comment (2) to Instruction 4.21.841(a)(1) concerning enhanced penalties for drug quantity.

4.18.371(2)***Pinkerton Charge***

[Updated: 6/14/02]

There is another method by which you may evaluate whether to find [defendant] guilty of the substantive charge in the indictment.

If, in light of my instructions, you find beyond a reasonable doubt that [defendant] was guilty on the conspiracy count (Count ____), then you may also, but you are not required to, find [him/her] guilty of the substantive crime charged in Count ____, provided you find beyond a reasonable doubt each of the following elements:

First, that someone committed the substantive crime charged in Count ____;

Second, that the person you find actually committed the substantive crime was a member of the conspiracy of which you found [defendant] was a member;

Third, that this co-conspirator committed the substantive crime in furtherance of the conspiracy;

Fourth, that [defendant] was a member of this conspiracy at the time the substantive crime was committed and had not withdrawn from it; and

Fifth, that [defendant] could reasonably have foreseen that one or more of [his/her] co-conspirators might commit the substantive crime.

If you find all five of these elements to exist beyond a reasonable doubt, then you may find [defendant] guilty of the substantive crime charged, even though [he/she] did not personally participate in the acts constituting the crime or did not have actual knowledge of them.

If, however, you are not satisfied as to the existence of any one of these five elements, then you may not find [defendant] guilty of the particular substantive crime unless the government proves beyond a reasonable doubt that [defendant] personally committed that substantive crime, or aided and abetted its commission.

Comment

(1) This instruction is adapted from Sand, et al., Instruction 19-13. The instruction implements the rule laid down in Pinkerton v. United States, 328 U.S. 640 (1946). The instruction can be given even though the indictment does not charge vicarious liability. See United States v. Sanchez, 917 F.2d 607, 612 (1st Cir. 1990).

(2) The model instruction omits the penultimate paragraph of Sand, et al., Instruction 19-13. That paragraph attempts to explain the reason for the *Pinkerton* rule, namely that co-conspirators act as agents of one another and therefore are liable for each other's acts. The paragraph seems to fall into

an area more appropriate for argument, preemptively addressing possible juror concerns about the fairness of a rule of vicarious liability. Such an explanation may be fair ground for closing argument, but it seems out of place in the court's charge.

If a court is inclined to include such a paragraph, it should consider rewording the Sand charge, which reads, "all of the co-conspirators must bear criminal responsibility for the commission of the substantive crimes." The use of "must" seems inconsistent with the principle that the jury can? but is not required to? hold a defendant vicariously liable on a *Pinkerton* theory.

(3) The instruction requires that the substantive crime be committed while the defendant is a member of the conspiracy. There is no vicarious liability for acts committed before one joins a conspiracy, United States v. O'Campo, 973 F.2d 1015, 1021 (1st Cir. 1992) (explaining the requirement of contemporaneous participation: "[a]n individual cannot . . . be held reasonably to have 'foreseen' actions which occurred prior to his entrance in the conspiracy"), nor for acts committed after a true withdrawal from the conspiracy. United States v. Rogers, 102 F.3d 641, 644 (1st Cir. 1996) (stating that withdrawal "may insulate [a defendant] from *Pinkerton* liability for substantive crimes of others that occur after his withdrawal"); United States v. Munoz, 36 F.3d 1229, 1234 (1st Cir. 1994) (stating that the government's burden included proving that co-conspirators' acts were committed "at a time when [the defendant] was still a member of the conspiracy," but affirming the conviction on the grounds that there was no evidence of affirmative withdrawal).

(4) The theory of *Pinkerton* liability must not be confused with aider and abettor liability. The latter theory requires proof of a higher mental state, United States v. Collazo-Aponte, 216 F.3d 163, 196 (1st Cir. 2000), vacated on other grounds, 532 U.S. 1036 (2001); United States v. Shea, 150 F.3d 44, 50 (1st Cir. 1998), but has a "broader application": it can apply to acts that are not necessarily done pursuant to an agreement between the perpetrator and the defendant. Nye & Nissen v. United States, 336 U.S. 613, 620 (1949).

(5) Although the First Circuit has acknowledged the view in other circuits that the *Pinkerton* charge should not be given in "marginal case[s]" because of the risk that the jury will draw the inverse of the *Pinkerton* inference, *i.e.*, the jury will hold the defendant "vicariously liable" for a conspiracy merely because the government shows that others have committed numerous substantive offenses, United States v. Sanchez, 917 F.2d 607, 612 n.4 (1st Cir. 1990) (citing United States v. Sperling, 506 F.2d 1323, 1341-42 (2d Cir. 1974) (Friendly, J.)), the First Circuit seems skeptical of the alleged risk. See United States v. Wester, 90 F.3d 592, 597 (1st Cir. 1996) (rejecting a defendant's argument that a *Pinkerton* instruction was improper because when various substantive offenses are in issue and the government concentrates its proof on the substantive offenses rather than the conspiracy, there is undue risk that the jury will draw the inverse of the *Pinkerton* inference, stating "We agree neither with the premise nor the conclusion" and that dealing with such a "complication" is "well within" a jury's ability).

[Defendant] is charged with the illegal misapplication of bank funds. It is against federal law for a bank employee to misapply bank funds. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that [defendant] was an [officer; director; agent; employee] of [name of bank];

Second, that [name of bank] was [state bank's relationship to federal jurisdiction];

Third, that [defendant] willfully misapplied bank funds exceeding \$1,000.

“Willfully misapply” requires proof of two things: wrongful use of the bank’s funds, and intent to injure or defraud the bank. To “defraud” means to cause the bank, through consciously dishonest means, to part with its funds.

Comment

(1) “Courts have struggled to give precise definition to the crime of misapplication, consistently noting that ‘[t]he problem that has confronted and perplexed the courts is that there is no statutory definition or common law heritage that gives content to the phrase “willfully misapplies.”’ These uncertain origins have posed a challenge to courts attempting to distinguish bad judgment from bad conduct that is illegal. Nevertheless, in Wester, we recently discussed the two notions that underlie the crime of misapplication: one relating to conduct, *i.e.*, wrongful use of bank funds, the other focusing on an intent to injure or defraud a bank. The government cannot prove its claim of misapplication without establishing both elements. The interrelationship between these elements is subtle, given that ‘the same facts can easily be the basis for deeming the conduct to be wrongful and the intent fraudulent.’” United States v. Blasini-Lluberas, 169 F.3d 57, 62-63 (1st Cir. 1999) (quoting United States v. Wester, 90 F.3d 592, 595 (1st Cir. 1996)) (internal citations and footnote omitted). The reference to intent to *injure* the bank now seems questionable in light of the definition of defraud under 18 U.S.C. § 1344 in United States v. Kenrick, 221 F.3d 19, 26-29 (1st Cir. 2000) (en banc).

(2) If \$1,000 or less is taken, the crime is a misdemeanor. 18 U.S.C. § 656.

[Defendant] is accused of [escaping; attempting to escape] from [facility] while [he/she] was in federal custody. It is against federal law to [attempt to] escape from federal custody. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that on [date], [defendant] was in federal custody at [facility];

Second, that [he/she] was in custody because [he/she] had been [e.g., arrested for a felony charge; arrested for a misdemeanor charge; convicted of a crime];

Third, that [he/she] [left; attempted to leave] [facility] without permission; and

Fourth, that [he/she] knew that [he/she] did not have permission to leave.

Comment

(1) The nature of the custody must be proven specifically, since the statute provides for dual penalties: escape is a felony if custody was by reason of any conviction or a felony arrest, but only a misdemeanor if custody was by reason of a misdemeanor arrest or for extradition or expulsion. United States v. Vanover, 888 F.2d 1117, 1121 (6th Cir. 1989); United States v. Green, 797 F.2d 855, 858 n.4 (10th Cir. 1986); United States v. Edrington, 726 F.2d 1029, 1031 (5th Cir. 1984); United States v. Richardson, 687 F.2d 952, 958 (7th Cir. 1982); see also United States v. Bailey, 444 U.S. 394, 407 (1980) (stating in dictum that prosecution must prove nature of custody to convict under section 751(a)). The determination of whether an offense underlying an arrest is a felony or misdemeanor is a question of law for the court, but the determination that the defendant was being held by reason of conviction or arrest for a particular crime is a question of fact for the jury. Richardson, 687 F.2d at 958.

(2) Custody need not involve physical restraint; the failure to comply with an order that restrains the defendant's freedom may be an escape. Bailey, 444 U.S. at 413 (holding that failure to return to custody is an "escape" in violation of section 751); United States v. Puzzanghera, 820 F.2d 25, 26 n.1 (1st Cir. 1987); see also 18 U.S.C. § 4082(a) ("The willful failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed . . . shall be deemed an escape [under 18 U.S.C. §§ 751-57].").

(3) The defense of necessity or duress may be an issue. On this matter, see Bailey, 444 U.S. at 409-13.

[Defendant] is accused of aiding or assisting [prisoner]'s escape from [facility] while [he/she] was in federal custody. It is against federal law to aid or assist someone else in [escaping; attempting to escape] from federal custody. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that on [date], [prisoner] was in federal custody at [facility];

Second, that [prisoner] was in custody because [he/she] had been [e.g., arrested for a felony charge; convicted of a crime];

Third, that [prisoner] [left; attempted to leave] [facility] without permission;

Fourth, that [prisoner] knew that [he/she] did not have permission to leave; and

Fifth, that [defendant] knew that [prisoner] was [escaping; attempting to escape] and intentionally helped [him/her] to do so.

Comment

- (1) See generally Notes to Instruction 4.18.751 for Escape from Custody, 18 U.S.C. § 751.
- (2) Section 752 also makes it an offense to instigate an escape. If the facts so warrant, the word “instigate” should be added or substituted for “aid or assist” with appropriate grammatical changes.
- (3) The crime of aiding or assisting an escape cannot occur after the escapee reaches temporary safety or a point beyond immediate active pursuit. United States v. DeStefano, 59 F.3d 1, 4-5 & n.6 (1st Cir. 1995). At that point, any further assistance can at most constitute harboring or concealing under 18 U.S.C. § 1072. Id. at 4.
- (4) The government need not prove that the defendant was aware of the federal status of the escaped prisoner. United States v. Aragon, 983 F.2d 1306, 1310 (4th Cir. 1993); United States v. Hobson, 519 F.2d 765, 769-70 (9th Cir. 1975); cf. United States v. Feola, 420 U.S. 671, 685 (1975) (“The concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum.”).

4.18.922(a)**False Statement in Connection With Acquisition of a Firearm,
18 U.S.C. § 922(a)(6)**

[New: 11/26/02]

[Defendant] is charged with making a false statement in connection with trying to buy a [firearm/ammunition], specifically [insert alleged false statement]. It is against federal law to knowingly make a false statement in connection with trying to buy a [firearm/ammunition]. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that [defendant] knowingly made a false statement as charged in the Indictment;

Second, that at the time [he/she] made the statement, [defendant] was trying to buy a [firearm/ammunition] from a [licensed dealer/licensed importer/licensed manufacturer/ licensed collector]; and

Third, that the statement was intended to, or likely to, deceive the licensed dealer/licensed importer/licensed manufacturer/licensed collector] about a fact material to the lawfulness of the sale.

The government does not have to prove that [defendant] knew that he/she was violating the law.

A statement is “false” if it is untrue when made.

A false statement is made “knowingly” if the person making it knows that it is false or demonstrates a reckless disregard for the truth, with a conscious purpose to avoid learning the truth.

A fact is “material” if it has a natural tendency to influence or to be capable of influencing the decision of the [licensed dealer/licensed importer/licensed manufacturer/licensed collector] as to whether it is lawful to sell the [firearm/ammunition] to the buyer, regardless of whether the [licensed dealer/licensed importer/licensed manufacturer/licensed collector] actually relies upon the statement.

Intent or knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] knew or intended at a particular time, you may consider any statements made or acts done or omitted by [defendant] and all other facts and circumstances received in evidence that may aid in your determination of [defendant]’s knowledge or intent. You may infer, but you certainly are not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

Comment

- (1) United States v. Currier, 621 F.2d 7, 10 (1st Cir. 1980), stated that section 922(a)(6) “does not require a showing that appellant ‘knowingly’ violated the law; it simply requires proof that appellant ‘knowingly’ made a false statement.”
- (2) The definition of “knowingly” is different from the customary definition of “knowingly” in Pattern 2.14 for other types of offenses. It comes from United States v. Wright, 537 F.2d 1144, 1145 (1st Cir. 1976), a case arising under 18 U.S.C. § 922(a)(6). United States v. Santiago-Fraticelli, 730 F.2d 828, 831 (1st Cir. 1984), emphasized that section 922(a)(6)’s scope is “not limited to situations in which an accused knew he was lying.” “[W]hen a person recklessly fails to ascertain the meaning of the questions contained in Form 4473, and simply answers the questions without regard to whether the answers are truthful,” he is acting “knowingly” for purposes of this section.
- (3) Section 922 does not require proof that the transaction was in interstate commerce. The requirement of a transaction with a licensed dealer is sufficient. Those dealers’ general involvement with interstate commerce is ample to justify federal regulation of even intrastate sales. United States v. Crandall, 453 F.2d 1216, 1217 (1st Cir. 1972).
- (4) The definition of “material” is modified from United States v. Arcadipane, 41 F.3d 1, 7 (1st Cir. 1994).
- (5) If necessary, a definition of “firearm” can be taken from the statute, 18 U.S.C. § 921(a)(3).

4.18.922(g) Possession of a Firearm or Ammunition in or Affecting Commerce by a Convicted Felon, 18 U.S.C. § 922(g)(1)

[Updated: 2/11/03]

[Defendant] is charged with possessing [a firearm; ammunition] in or affecting commerce after having been convicted of a crime punishable by imprisonment for more than one year. It is against federal law for a convicted felon to possess [a firearm; ammunition] that was connected with interstate [or foreign] commerce. For you to find [defendant] guilty of this crime, you must be satisfied that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] has been convicted in any court of [at least one] crime punishable by imprisonment for a term exceeding one year. I instruct you that the crime of [_____] is such a crime. [*Alternative*: The parties have stipulated that [defendant] has been convicted of a crime which is punishable by imprisonment for a term exceeding one year. You are to take that fact as proven.]

Second, that [defendant] knowingly possessed the [firearm; ammunition] described in the indictment. [The term “firearm” means any weapon which will or is designed or may readily be converted to expel a projectile by the action of an explosive. The term “firearm” also includes the frame or receiver of any such weapon.]

Third, that the firearm was connected with interstate [or foreign] commerce. This means that the [firearm; ammunition], at any time after it was manufactured, moved from one state to another [or from a foreign country into the United States]. The travel need not have been connected to the charge in the indictment and need not have been in furtherance of any unlawful activity.

The word “knowingly” means that the act was done voluntarily and intentionally, not because of mistake or accident.

The term “possess” means to exercise authority, dominion or control over something. It is not necessarily the same as legal ownership. The law recognizes different kinds of possession.

[Possession includes both actual and constructive possession. A person who has direct physical control of something on or around his or her person is then in actual possession of it. A person who is not in actual possession, but who has both the power and the intention to exercise control over something is in constructive possession of it. Whenever I use the term “possession” in these instructions, I mean actual as well as constructive possession.]

[Possession [also] includes both sole and joint possession. If one person alone has actual or constructive possession, possession is sole. If two or more persons share actual or constructive possession, possession is joint. Whenever I have used the word “possession” in these instructions, I mean joint as well as sole possession.]

Comment

- (1) The charge is based on United States v. Bartelho, 71 F.3d 436, 439 (1st Cir. 1995).
- (2) The definition of “knowingly” is based on United States v. Tracy, 36 F.3d 187, 194-95 (1st Cir. 1994). Care must be taken, however, for some parts of the firearms statute require proof of willfulness. See 18 U.S.C. § 924(a)(1)(D). Willfulness requires proof that the defendant knew the conduct was unlawful. Bryan v. United States, 524 U.S. 184, 192 (1998).
- (3) United States v. Rogers, 41 F.3d 25, 29 (1st Cir. 1994), discusses dominion, control, possession and ownership. United States v. Booth, 111 F.3d 1, 2 (1st Cir. 1997), counsels against defining constructive possession in terms of dominion and control “over the area in which the object is located” and thereby limits United States v. Wight, 968 F.2d 1393, 1398 (1st Cir. 1992). However, the jury may be told in appropriate circumstances that knowledge could be inferred from control of the area. See Booth, 111 F.3d at 2.
- (4) Possession of multiple firearms and/or ammunition in one place at one time constitutes only a single offense under 18 U.S.C. § 922(g). United States v. Verrecchia, 196 F.3d 294, 298 (1st Cir. 1999). In a multiple weapons case, no instruction requiring jury unanimity on any particular firearm is required. Id. Because possession of multiple weapons is a single offense unless there are separate possessions, the trial judge faced with multiple possession counts must decide whether to: (1) require the government to elect or combine counts before trial; (2) allow multiple counts but require a specific jury finding of separate possessions; or (3) allow multiple counts with no special jury instruction, but make a post-verdict “correction” by not entering judgment of conviction on any multiplicitous counts. Three circuits have made it clear that the jury, not the trial or appellate judges, must find separate possession as a critical element of a multi-count weapons possession conviction. United States v. Frankenberry, 696 F.2d 239, 245 (3d Cir. 1982); United States v. Szalkiewicz, 944 F.2d 653, 654 (9th Cir. 1991); United States v. Valentine, 706 F.2d 282, 294 (10th Cir. 1983). The Eleventh Circuit has held that it was not plain error for the trial judge to fail to give a separate possession instruction, and upheld conviction on multiple counts because sufficient evidence of separate possession was presented at trial, even though there was no jury finding to that effect. United States v. Bonavia, 927 F.2d 565, 569-71 (11th Cir. 1991). The Sixth Circuit in United States v. Throneburg, 921 F.2d 654, 657 (6th Cir. 1990), explained that the trial judge should exercise his or her discretion to vacate any multiplicitous guilty verdicts, the government in its discretion can decide how many counts to bring, and no jury instruction or finding is required as to separate possessions. A possible instruction is as follows:

If you have found the defendant guilty on Count I, you may not find [him/her] guilty on Count II unless you also find that the government has proven beyond a reasonable doubt that the firearm and ammunition were acquired at different times or that they were stored in different places.
- (5) United States v. Acosta, 67 F.3d 334, 340 (1st Cir. 1995), supports the broad definition of “commerce.” See also United States v. Joost, 133 F.3d 125, 131 (1st Cir. 1998).
- (6) The trial judge determines as a matter of law whether a previous conviction qualifies under 18

U.S.C. § 922(g)(1). Bartelho, 71 F.3d at 440. The *fact* of conviction, however, is for the jury unless it is stipulated, and so too is any factual issue on the restoration of civil rights. Id. at 440-41. It should be noted that, although the court in Bartelho found the approach of United States v. Flower, 29 F.3d 530 (10th Cir. 1994), persuasive, 71 F.3d at 440, Flower seems to be in conflict with Bartelho to the extent that it treats a factual dispute concerning restoration of civil rights as a preliminary matter to be resolved by the court prior to admitting the conviction into evidence. See 29 F.2d at 535-36.

(7) An aiding and abetting charge under the statute requires the court to instruct the jury that the aiding and abetting defendant must know or have cause to believe the firearm possessor's status as a convicted felon. United States v. Xavier, 2 F.3d 1281, 1286-87 (3d Cir. 1993).

(8) For a charge of possessing a firearm with an altered serial number under 18 U.S.C. § 922(k), the First Circuit has said that it is "ordinarily . . . enough to charge the jury in the words of the statute, leaving it to the common sense of the jury to understand the purpose and to adjust its application to carry out that purpose. 'Alter,' in this statute, is not some highly obscure or special-purpose term that cries out for elaboration. This, then, is an instance in which the district judge may choose to elaborate but is not ordinarily required to do so." United States v. Adams, No. 02-1007, 2002 WL 31065286, at *2 (1st Cir. Sept. 20, 2002).

4.18.924 Using or Carrying a Firearm During and in Relation to, or Possessing a Firearm in Furtherance of Drug Trafficking or Crime of Violence, 18 U.S.C. § 924(c)

[Updated: 2/11/03]

[Defendant] is accused of using or carrying a firearm during and in relation to, or possessing a firearm in furtherance of [____]. It is against federal law to [use/carry/possess] a firearm [during/in relations to/in furtherance of] [____]. For you to find [defendant] guilty of this crime, you must be satisfied that the government has proven each of the following things:

First, [defendant] committed the crime of [____, described in Count ____]; and

Second, [defendant] knowingly used or carried a firearm during and in relation to, or possessed a firearm in furtherance of the commission of that crime.

The word “knowingly” means that an act was done voluntarily and intentionally, not because of mistake or accident.

To “carry” a firearm during and in relation to a crime means to move or transport the firearm on one’s person or in a vehicle or container during and in relation to the crime. It need not be immediately accessible.

To “use” a firearm during and in relation to a crime means to employ the firearm actively, such as to brandish, display, barter, strike with, fire or attempt to fire it, or even to refer to it in a way calculated to affect the underlying crime. The firearm must have played a role in the crime or must have been intended by the defendant to play a role in the crime. That need not have been its sole purpose, however.

A defendant’s possession of a firearm is “in furtherance of” a crime if the firearm possession made the commission of the underlying crime easier, safer or faster, or in any other way helped the defendant commit the crime. There must be some connection between the firearm and the underlying crime, but the firearm need not have been actively used during the crime.

Comment

(1) If the predicate crime of violence or drug trafficking is not charged in the same indictment, the jury must be instructed as to the elements of that crime and that the government must prove each element beyond a reasonable doubt. The First Circuit has cautioned against “generic references to ‘a drug trafficking crime’ when referring to the particular predicate offense.” United States v. Manning, 79 F.3d 212, 221 n.9 (1st Cir. 1996). It is a question of law for the court, however, whether the crime, if proven, qualifies as a crime of violence or drug trafficking. United States v. Weston, 960 F.2d 212, 217 (1st Cir. 1992), overruled on other grounds by Stinson v. United States, 508 U.S. 36 (1993). But see Eleventh Circuit Instruction 28 (instructing jury to determine whether or not the predicate offense is a “crime of violence”), criticized by Sand, et al., ¶ 35.08, at 35-112. “Drug trafficking crime” and “crime of violence” are defined in 18 U.S.C. § 924(c)(2), (3).

(2) The definition of “knowingly” is based upon United States v. Tracy, 36 F.3d 187, 194-95 (1st Cir. 1994).

(3) The definition of “use” comes from United States v. Valle, 72 F.3d 210, 217 (1st Cir. 1995), and Bailey v. United States, 516 U.S. 137, 143-48 (1995). Earlier cases must be treated with great care. Muscarello v. United States, 524 U.S. 125, 127 (1998), established that “carry” includes the use of a vehicle. See also United States v. Ramirez-Ferrer, 82 F.3d 1149, 1153-54 (1st Cir. 1996) (a firearm can be “carried” by having it in a boat); Manning, 79 F.3d at 212.

It seems best not to define “use or carry” separately from “during and in relation to.” Possession alone without proof of a relationship to the underlying crime is insufficient, United States v. Plummer, 964 F.2d 1251, 1254-55 (1st Cir. 1992), but facilitating the predicate crime need not be the sole purpose. United States v. Payero, 888 F.2d 928, 929 (1st Cir. 1989).

Use or availability of the firearm for offensive or defensive purposes is not required. See Smith v. United States, 508 U.S. 223, 236-39 (1993) (holding that § 924(c)(1) applies where the defendant merely bartered weapons for drugs).

(4) The First Circuit has not yet defined “in furtherance of” as it is used in this statute. Congress added this language to the statute in response to Bailey v. United States, 516 U.S. 137, 141, 149-50 (1995), where the Court held that the word “use” requires some active employment of the firearm. See United States v. Ceballos-Torres, 218 F.3d 409, 413-14 (5th Cir. 2000) (discussing the legislative history of the amendment). Although the First Circuit has decided one case involving the “in furtherance of” language, it has not defined the term explicitly. See United States v. Collazo-Aponte, 216 F.3d 163, 195 (1st Cir. 2000), vacated on other grounds by 532 U.S. 1036 (2001) (upholding conviction where defendant carried a firearm while helping others hunt down a member of a rival drug organization, even though the defendant’s firearm was not used to kill the victim).

Those circuits that have analyzed the issue in greater depth have concluded that “the statutory term ‘furtherance’ should be given its plain meaning[:] ... ‘[t]he act of furthering, advancing, or helping forward.’” United States v. Lomax, No. 01-4487, 2002 WL 1309020, at * 3 (4th Cir. June 14, 2002); accord United States v. Wahl, 290 F.3d 370, 376 (D.C. Cir. 2002); United States v. Timmons, 283 F.3d 1246, 1252-53 (11th Cir. 2002) (“there must be a showing of some nexus between the firearm and the drug selling operation”); United States v. Basham, 268 F.3d 1199, 1207 (10th Cir. 2001); United States v. Mackey, 265 F.3d 457, 460-61 (6th Cir. 2001) (“the weapon must promote or facilitate the crime”); Ceballos-Torres, 218 F.3d at 415; see also United States v. Iiland, 254 F.3d 1264, 1270 (10th Cir. 2001) (discussing the issue in depth without formulating a specific definition).

Factors that a jury may consider when deciding whether a defendant’s possession of a firearm is “in furtherance of” a crime include:

the type of [criminal] activity that is being conducted, accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to [criminal proceeds or contraband], and the time and circumstances under which the gun is found.

Ceballos-Torres, 218 F.3d at 414-15, quoted in Lomax, 2002 WL 1309020, at ** 3-4; Wahl, 290 F.3d at 376; Timmons, 283 F.3d at 1253; Mackey, 265 F.3d at 462; Basham, 268 F.3d at 1208.

(5) For definition of “firearm,” see 18 U.S.C. § 921(a)(3).

(6) An aiding or abetting instruction may be appropriate for either or both of the two elements of the crime, but the jury should be instructed that the “shared knowledge” requirement, see Instruction 4.18.02 (Aid and Abet), requires that the defendant have a “practical certainty” the firearm will be used. United States v. Balsam, 203 F.3d 72, 83 (1st Cir. 2000); United States v. Spinney, 65 F.3d 231, 238 (1st Cir. 1995); see also United States v. Otero-Mendez, 273 F.3d 46, 52 (1st Cir. 2001) (carjacking case) (“prosecution must prove that [defendant] knew a firearm would be carried or used in a crime of violence and that he willingly took some action to facilitate that carriage or use”).

4.18.982 Money Laundering—Forfeiture, 18 U.S.C. § 982(a)(1)

[New: 2/11/03]

In light of your verdict that [defendant] is guilty of money laundering, you must now also decide whether [he/she] should surrender to the government [his/her] ownership interest in certain property as a penalty for committing that crime. We call this “forfeiture.”

On this charge, federal law provides that the government is entitled to forfeiture, if it proves, by a preponderance of the evidence, that the property in question:

- (1) was involved in one or more of the money laundering Counts of which you have convicted [defendant]; **OR**
- (2) was traceable to such property.

Note that this is a different standard of proof than you have used for the money laundering charges. A “preponderance of the evidence” means an amount of evidence that persuades you that something is more likely true than not true. It is not proof beyond a reasonable doubt.

Property “involved in” a money laundering transaction means the money being laundered, any commissions or fees paid to the launderer, and any property used to facilitate the laundering. Mingling tainted funds with legitimate funds exposes the legitimate funds to forfeiture as well, if the mingling was done for the purpose of concealing the nature or source of the tainted funds, in other words, to “facilitate” the money laundering.

While deliberating, you may consider any evidence admitted during the trial. However, you must not reexamine your previous determination regarding [defendant]’s guilt of money laundering. All of my previous instructions concerning consideration of the evidence, the credibility of witnesses, your duty to deliberate together and to base your verdict solely on the evidence without prejudice, bias or sympathy, and the requirement of unanimity apply here as well.

On the verdict form, I have listed the various items that the government claims [defendant] should forfeit. You must indicate which, if any, [defendant] shall forfeit.

Do not concern yourselves with claims that others may have to the property. That is for the judge to determine later.

Comment

(1) This forfeiture instruction can be used if the underlying offense is 21 U.S.C. § 1956(a)(1), (2) or (3) or 21 U.S.C. § 1957. See 18 U.S.C. § 982(a)(1).

(2) The right to a jury trial on a criminal forfeiture count is not constitutional. Libretti v. United States, 516 U.S. 29 (1995). Instead, it is created solely by rule as follows:

Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

Fed. R. Crim. P. 32.2(b)(4). The language of the Rule seems to contemplate a bifurcated proceeding, see also 2000 Advisory Committee Note. Pre-Libretti First Circuit caselaw left bifurcation to the trial judge's discretion. See, e.g., United States v. Desmarais, 938 F.2d 347, 349-50 (1st Cir. 1991); United States v. Maling, 737 F. Supp. 684, 705 (D. Mass. 1990), aff'd, sub nom. United States v. Richard, 943 F.2d 115 (1st Cir. 1991); United States v. Saccoccia, 58 F.3d 754, 770 (1st Cir. 1995).

Note that some commentators question the vitality of Libretti after Apprendi v. New Jersey, 530 U.S. 466 (2000). See Nancy J. King and Susan R. Klein, Essential Elements, 54 Vand. L. Rev. 1467, 1481 n.51 (2001) ("These factual showings [in forfeiture proceedings] arguably must be treated as elements after Apprendi.") and David B. Smith, Prosecution and Defense of Forfeiture Cases § 14.03A, at 14-46 (2002) ("The unconstitutionality of Rule 32.2's scheme is patently obvious from Apprendi."). The First Circuit has not addressed the issue, but the case law from other circuits holds that Libretti is not disturbed by Apprendi as it applies to forfeiture proceedings. See, e.g., United States v. Cabeza, 258 F.3d 1256, 1257 (11th Cir. 2001) ("Because forfeiture is a punishment and not an element of the offense, it does not fall within the reach of Apprendi"); United States v. Corrado, 227 F.3d 543, 550 (6th Cir. 2000) ("There is no requirement under Apprendi . . . that the jury pass upon the extent of a forfeiture"); United States v. Powell, 38 Fed. Appx. 140, 141 (4th Cir. 2002) ("Because forfeiture is a punishment rather than an element of the offense, Apprendi is not implicated.").

(3) Rule 32.2 seems to indicate that the question of a money judgment is for the court only, and never for the jury. The text of 32.2(b)(1) divides its description of the court's role: "If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant has to pay." Fed. R. Crim. P. 32.2(b)(1) (2002) (emphasis added). The jury's role is limited to the nexus determination for property: "Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant," Fed. R. Crim. P. 32.2(b)(4). There is no reference to the jury's role in a money judgment.

The advisory committee notes for the 2000 adoption also support this distinction. After explicitly taking no position on the correctness of allowing money judgments (the First Circuit permits them, see, e.g., United States v. Candelaria-Silva, 166 F.3d 19, 42 (1st Cir. 1999)), the notes go on to prescribe different decisional rules for the different kinds of judgments: when forfeiture of property is asked for, the court determines the nexus; when a personal money judgment is asked for, the court determines the amount. Fed. R. Crim. P. 32.2(b)(1), advisory committee's note. Then, in discussing subdivision (b)(4), the notes state, "The only issue for the jury in such cases would be whether the government has established the requisite nexus between the property and the offense." Fed. R. Crim. P. 32.2(b)(4), advisory committee's note (emphasis added). No mention is made of a role for the jury

with respect to personal money judgments.

This distinction has been noted by some commentators, see, e.g., Smith, supra, at 14-48 (“There is no right to a jury trial of the forfeiture issue if . . . the government seeks a personal money judgment instead of an order forfeiting specific assets”) (emphasis supplied), but has not been dealt with by the courts. Although there is room for some uncertainty, this seems to be the best interpretation of the rule.

(4) The standard of proof is preponderance of the evidence. United States v. Saccoccia, 823 F. Supp. 994, 997 (D.R.I. 1993), aff’d, United States v. Saccoccia, 58 F.3d 754 (1st Cir. 1995). Note the possible Appendi issue in the preceding comments.

(5) The definition of “involved in” comes from United States v. McGauley, 279 F.3d 62, 75-76 & n.14 (1st Cir. 2002).

(6) The rights of third parties are determined in an ancillary proceeding before the judge without a jury. 2000 Advisory Committee Note to Rule 32.2(b)(4).

4.18.1001 Making a False Statement to a Federal Agency, 18 U.S.C. § 1001

[Updated: 2/11/03]

[Defendant] is charged with making a false statement in a matter within the jurisdiction of a government agency. It is against federal law to make a false statement in a matter within the jurisdiction of a government agency. For you to find the defendant guilty of this crime you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that [defendant] knowingly made a material false statement;

Second, that [defendant] made the statement voluntarily and intentionally; and

Third, that [defendant] made the statement in a [e.g., U.S. Customs declaration].

A false statement is made “knowingly” if the defendant knew that it was false or demonstrated a reckless disregard for the truth with a conscious purpose to avoid learning the truth.

A statement is “material” if it has a natural tendency to influence or to be capable of influencing the decision of the decisionmaker to which it was addressed, regardless of whether the agency actually relied upon it.

A statement is “false” if it was untrue when made.

Comment

(1) A false “exculpatory no” is sufficient. Brogan v. United States, 522 U.S. 398, 408 (1998), overruling United States v. Chevoor, 526 F.2d 178, 183-84 (1st Cir. 1975). “To prove a false statement in violation of 18 U.S.C. § 1001, the government must show that the defendant: (1) knowingly and willfully, (2) made a statement, (3) in relation to a matter within the jurisdiction of a department or agency of the United States, (4) with knowledge of its falsity.” United States v. Duclos, 214 F.3d 27, 33 (1st Cir. 2000).

(2) The charge refers only to false statements. Section 1001, the False Statements Accountability Act of 1996, is much broader, and in a given case the instruction will need to be modified to deal with the other potential violations. See 18 U.S.C. § 1001(a)(1)-(3) (punishing one who “knowingly and willfully (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry”) (as amended by PL 104-292, Oct. 11, 1996).

(3) In United States v. London, 66 F.3d 1227, 1241-42 (1st Cir. 1995), the First Circuit stated that “[i]n the context of the False Statements Act, 18 U.S.C. § 1001, a false statement is made knowingly if defendant demonstrated a reckless disregard of the truth, with a conscious purpose to avoid learning the truth.” The First Circuit also has approved instructing the jury on good faith and referring to advice of counsel in that respect. United States v. Arcadipane, 41 F.3d 1, 8 (1st Cir. 1994); see also

United States v. Dockray, 943 F.2d 152, 155 (1st Cir. 1991) (“[G]ood faith is an absolute defense to a charge of mail or wire fraud. . .”).

(4) In United States v. Gaudin, 515 U.S. 506, 511 (1995), the Supreme Court held that the issue of materiality is for the jury.

(5) The definition of materiality is based upon both United States v. Seabagala, 256 F.3d 59, 65 (1st Cir. 2001), and the court’s description of what the parties agreed to as a definition in Gaudin, 515 U.S. at 509. Accord Arcadipane, 41 F.3d at 7 (“[M]ateriality requires only that the fraud in question have a natural tendency to influence, or be capable of affecting or influencing, a governmental function. The alleged concealment or misrepresentation need not have influenced the actions of the Government agency, and the Government agents need not have been actually deceived.” (quoting United States v. Corsino, 812 F.2d 26, 30 (1st Cir. 1986))).

(6) The statute deals only with false statements “within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.” 18 U.S.C. § 1001(a). It seems best to specify in the instruction the document or other context in which the false statement was allegedly made. Whether it was made there is a jury issue. It should be a separate question for the judge whether that document or context brings it “within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.” Id.

(7) The government is not required to prove that the defendant had a purpose to mislead a federal agency, United States v. Yermian, 468 U.S. 63, 68-75 (1984), or that the statement was made for a fraudulent purpose. United States v. McGauley, 279 F.3d 62, 69 (1st Cir. 2002).

4.18.1014**Making a False Statement or Report, 18 U.S.C. § 1014**

[Updated: 2/11/03]

[Defendant] is charged with making a false statement or report for the purpose of influencing the action of [appropriate governmental agency or entity listed in statute] upon [his/her] [application; commitment; loan; etc.]. It is against federal law to make a false statement for such a purpose. For you to find the defendant guilty of this crime you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that [defendant] made or caused to be made a false statement or report to [appropriate governmental agency or entity listed in statute] upon [an application; commitment; loan; etc.];

Second, that [defendant] acted knowingly; and

Third, that [defendant] made the false statement or report for the purpose of influencing in any way the action of [appropriate governmental agency/ financial institution] on the [application; commitment; loan; etc.].

A false statement is made “knowingly” if the defendant knew that it was false or demonstrated a reckless disregard for the truth with a conscious purpose to avoid learning the truth.

A statement is “false” if it was untrue when made.

Comment

- (1) This charged is based largely upon United States v. Concemi, 957 F.2d 942, 951 (1st Cir. 1992).
- (2) Materiality is not required. United States v. Wells, 519 U.S. 482, 489-90 (1997).
- (3) Section 1014 also includes “willful overvalu[ation].” This charge refers only to false statements or reports, but can be modified accordingly.
- (4) Section 1014 lists the governmental agencies and related entities covered by the statute as well as the kinds of actions that are covered.
- (5) When the victim is a federally insured bank, the knowledge that must be proven is knowledge that a bank will be defrauded, not any specific bank, and not knowledge of its insured status. United States v. Graham, 146 F.3d 6, 10 (1st Cir. 1998).
- (6) Letters of credit are included. United States v. Agne, 214 F.3d 47, 54 (1st Cir. 2000).

[Defendant] is charged with knowingly and fraudulently using [an] unauthorized access device[s] between [date] and [date]. It is against federal law to knowingly and fraudulently use access devices without authorization.

For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] used [an] access device[s];

Second, that [defendant] used it without authorization and thereby obtained something of value aggregating at least \$1,000 during the one-year period from [date] to [date];

Third, that [defendant] acted knowingly, willfully and with the intent to defraud;

Fourth, that [defendant]'s conduct affected interstate or foreign commerce.

The term “access device” [means any card, plate, code, account number or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services or any other thing of value, or that can be used to initiate a transfer of funds other than a transfer originated solely by paper instrument. It] includes credit cards.

The term “unauthorized access device” includes any access device or credit card that is lost, stolen, expired, revoked, canceled or obtained with intent to defraud.

[Defendant] acted “knowingly” if [he/she] was conscious and aware of [his/her] actions, realized what [he/she] was doing or what was happening around [him/her], and did not act because of ignorance, mistake or accident.

To act with “intent to defraud” means to act with the intent to deceive or cheat someone. Good faith on the part of [defendant] is a complete defense to a charge of credit card fraud. If [defendant] actually believed in good faith that [he/she] was acting properly, even if [he/she] was mistaken in that belief, and even if others were injured by [his/her] conduct, there would be no crime. An honest mistake in judgment does not rise to the level of criminal conduct. A defendant does not act in good faith if, even though he or she honestly holds a certain opinion or belief, he or she also acted with the purpose of deceiving others. While the term good faith has no precise definition, it means among other things a belief or opinion honestly held, an absence of malice or ill will, and an intention to avoid taking unfair advantage of another. The burden is on the government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt. The defendant is under no obligation to prove good faith.

Conduct “affects” interstate or foreign commerce if the conduct has a demonstrated connection or link with such commerce. It is not necessary for the government to prove that [defendant] knew or intended

that [his/her] conduct would affect commerce; it is only necessary that the natural consequences of [his/her] conduct affected commerce in some way.

Comment

(1) The definition of good faith used here was cited approvingly in the context of credit card fraud in United States v. Goodchild, 25 F.3d 55, 59-60 (1st Cir. 1994).

(2) This instruction can be modified for § 1029(a)(1) and (3) offenses (knowingly and with intent to defraud producing, using, or trafficking in a counterfeit access device or possessing 15 or more counterfeit or unauthorized access devices). (The elements of interstate commerce and intent to defraud are the same.) On a § 1029(a)(3) offense, the jury does not have to be unanimous on which 15 cards were illegally possessed. United States v. Lee, ___ F.3d ___, No. 02-1644, 2003 WL 133007 (1st Cir. Jan. 17, 2003).

[Defendant] is accused of harboring or concealing an escaped prisoner, [prisoner]. It is against federal law to harbor or conceal an escaped prisoner. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that [prisoner] escaped from [the custody of the Attorney General; federal penal or correctional institution];

Second, that [defendant] did some physical act to help to allow [prisoner] to avoid detection or apprehension;

Third, that [defendant] acted knowingly and willfully.

To act “knowingly and willfully” means to act with the knowledge that [prisoner] has escaped from custody and with the purpose and intent to help or allow him to avoid detection or apprehension.

Comment

(1) If the Attorney General has designated a nonfederal facility as the place of incarceration, escape from that facility is an escape from “the custody of the Attorney General” under this section. United States v. Eaglin, 571 F.2d 1069, 1073 (9th Cir. 1977).

(2) Several circuits have held that “[t]he words ‘harbor’ and ‘conceal’ refer to any physical act of providing assistance, including food, shelter, and other assistance to aid the prisoner in avoiding detection and apprehension.” United States v. Kutas, 542 F.2d 527, 528 (9th Cir. 1976); see also Laaman v. United States, 973 F.2d 107, 114 (2d Cir. 1992) (construing same terms as in section 1071, which proscribes concealing fugitives from arrest rather than escaped prisoners); United States v. Yarbrough, 852 F.2d 1522, 1543 (9th Cir. 1988) (same); United States v. Silva, 745 F.2d 840, 849 (4th Cir. 1984) (same); United States v. Foy, 416 F.2d 940, 941 (7th Cir. 1969) (same).

(3) Section 1072 requires proof that the defendant “willfully” harbored or concealed the escaped prisoner. This element has been read to require that the defendant had knowledge that the person whom he aided had escaped from custody. Eaglin, 571 F.2d at 1074; United States v. Deaton, 468 F.2d 541, 543 (5th Cir. 1972). It is not necessary that the government prove that the defendant was aware of the federal status of the escaped prisoner. Eaglin, 571 F.2d at 1074 n.4; cf. United States v. Aragon, 983 F.2d 1306, 1310 (4th Cir. 1993) (knowledge of federal status not an element of assisting escape under 18 U.S.C. § 752); United States v. Feola, 420 U.S. 671, 684-85 (1975) (knowledge of federal status not an element of assaulting a federal officer under 18 U.S.C. § 111).

[Defendant] is charged with violating the federal statute making mail fraud illegal.

For you to find [defendant] guilty of mail fraud, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, a scheme, substantially as charged in the indictment, to defraud [or to obtain money or property by means of false or fraudulent pretenses];

Second, [defendant]'s knowing and willful participation in this scheme with the intent to defraud [or to obtain money or property by means of false or fraudulent pretenses]; and

Third, the use of the United States mail, on or about the date charged, in furtherance of this scheme.

The mailings do not themselves have to be essential to the scheme, but must have been made to carry it out. There is no requirement that [defendant] [him/herself] was responsible for the mailings.

A scheme includes any plan, pattern or course of action. The term “defraud” means to deceive another in order to obtain money or property by misrepresenting or concealing a material fact. It includes a scheme to deprive another of the intangible right of honest services.

[The term “false or fraudulent pretenses” means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth and that were made with the intent to defraud. They include actual, direct false statements as well as half-truths and the knowing concealment of facts.]

A “material” fact or matter is one that has a natural tendency to influence or be capable of influencing the decision of the decisionmaker to whom it was addressed.

[Defendant] acted “knowingly” if [he/she] was conscious and aware of [his/her] actions, realized what [he/she] was doing or what was happening around [him/her], and did not act because of ignorance, mistake or accident.

An act or failure to act is “willful” if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law. Thus, if [defendant] acted in good faith, [he/she] cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

Intent or knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] knew or intended at a particular time, you may consider any statements made or acts done or omitted by [defendant] and all other facts and circumstances received in evidence that may aid in your determination of [defendant]'s

knowledge or intent. You may infer, but you certainly are not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme or that the material transmitted by mail was itself false or fraudulent or that the alleged scheme actually succeeded in defrauding anyone or that the use of the mail was intended as the specific or exclusive means of accomplishing the alleged fraud.

What must be proven beyond a reasonable doubt is that [defendant] knowingly devised or intended to devise a scheme to defraud that was substantially the same as the one alleged in the indictment, and that the use of the mail on or about the date alleged was closely related to the scheme because [defendant] either received something in the mail or caused it to be mailed in an attempt to execute or carry out the scheme. To “cause” the mail to be used is to do an act with knowledge that the use of the mail will follow in the ordinary course of business or where such use can reasonably be foreseen.

Comment

(1) The definition of defraud comes from United States v. Kenrick, 221 F.3d 19, 26-27 (1st Cir. 2000) (en banc). We have dropped the statutory term “artifice” as archaic. It adds nothing to “scheme,” a term more understandable to most jurors. The mailings element comes from United States v. Sawyer, 239 F.3d 31, 39-40 (1st Cir. 2001).

(2) The “false or fraudulent pretenses” part of the statute extends it to “false promises and misrepresentations as to the future.” McNally v. United States, 483 U.S. 350, 359 (1987).

(3) Schemes to deprive others of the intangible right of honest services are included by virtue of 18 U.S.C. § 1346. Two kinds of intent must be proven: intent to deprive the public of honest services, and intent to deceive the public. United States v. Sawyer, 239 F.3d 31, 41 (1st Cir. 2001). Specific language should be drafted to deal with the particular charge. Consult Sawyer, *supra*; United States v. Woodward, 149 F.3d 46, 54-55 & n.6 (1st Cir. 1998); and United States v. Sawyer, 85 F.3d 713, 723-25 (1st Cir. 1996). Except for the honest services fraud, a fraud charge must involve “property.” Cleveland v. United States, 531 U.S. 12, 15, 20-25 (2000) (statute does not extend to fraud in obtaining state or municipal licenses because, although they are valuable, they are not “property” in the government regulators’ hands).

(4) Materiality must go to the jury. Neder v. United States, 527 U.S. 1, 4, 25 (1999).

(5) “It is not necessary to establish that the intended victim was *actually* defrauded.” United States v. Allard, 926 F.2d 1237, 1242 (1st Cir. 1991). Mail fraud does “not require that the victims be pure of heart.” United States v. Camuti, 78 F.3d 738, 742 (1st Cir. 1996).

(6) Good faith is an absolute defense. United States v. Dockray, 943 F.2d 152, 155 (1st Cir. 1991). Although good faith is included in this charge, “[a] separate instruction on good faith is not required in this circuit where the court adequately instructs on intent to defraud.” Camuti, 78 F.3d at 744 (citing United States v. Dockray, 943 F.2d 152, 155 (1st Cir. 1991)).

(7) There is no requirement that the person deceived be the same person who is deprived of money or property. United States v. Christopher, 142 F.3d 46, 53-54 (1st Cir. 1998).

(8) The First Circuit has approved the following instruction in a duty to disclose case:

A failure to disclose a material fact may also constitute a false or fraudulent misrepresentation if, one, the person was under a general professional or a specific contractual duty to make such a disclosure; and, two, the person actually knew such disclosure ought to be made; and, three, the person failed to make such disclosure with the specific intent to defraud.

. . . .

The government has to prove as to each count considered separately, that the alleged misrepresentation as charged in the indictment was made with the intent to defraud, that is, to advance the scheme or artifice to defraud. Such a scheme in each case has to be reasonably calculated to deceive a lender of ordinary prudence, ordinary care and comprehension.

. . . .

[I]t is not a crime simply to be careless or sloppy in discharging your duties as an attorney or a[s] an appraiser. That may be malpractice, but it's not a crime.

United States v. Cassiere, 4 F.3d 1006, 1022 (1st Cir. 1993) (alterations in original).

(9) In United States v. Blastos, 258 F.3d 25, 27 (1st Cir. 2001), the defendant argued that the previous pattern charge was inadequate under Neder v. United States, 527 U.S. 1 (1999), because the instruction did not identify materiality as a separate element of the offense. (Neder had not yet been decided when the first patterns were published.) The First Circuit assumed *arguendo* that was so, but found it harmless error in light of the rest of the charge on materiality, noting “that the district court gave an instruction on materiality that, although it did not meet the specific requirements of Neder, accomplished the same purpose.” Blastos, 258 F.3d at 29. The revised pattern still does not list materiality as a separate element because it seems most logical to treat it as part of the definition of “defraud” or “false or fraudulent pretenses.” An argument can be made in light of Blastos, however, that it is safer to separate out materiality as a separate numbered element of the offense. The instruction then presumably would add a new “Second” namely, “The use of false statements, assertions, half-truths, or knowing concealments, concerning material facts or matters;” and the other elements would be renumbered accordingly.

[Defendant] is charged with violating the federal statute making wire fraud illegal.

For you to find [defendant] guilty of wire fraud, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, a scheme, substantially as charged in the indictment, to defraud [or to obtain money or property by means of false or fraudulent pretenses];

Second, [defendant]’s knowing and willful participation in this scheme with the intent to defraud; and

Third, the use of interstate [or foreign] wire communications, on or about the date alleged, in furtherance of this scheme.

“Interstate [or foreign] wire communications” include telephone communications from one state to another [or between the United States and a foreign country.] [The term also includes a wire transfer of funds between financial institutions.]

A scheme includes any plan, pattern or course of action. The term “defraud” means to deceive another in order to obtain money or property by misrepresenting or concealing a material fact. It includes a scheme to deprive another of the intangible right of honest services.

[The term “false or fraudulent pretenses” means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth and that were made with the intent to defraud. They include actual, direct false statements as well as half-truths and the knowing concealment of facts.]

A “material” fact or matter is one that has a natural tendency to influence or be capable of influencing the decision of the decisionmaker to whom it was addressed.

[Defendant] acted “knowingly” if [he/she] was conscious and aware of [his/her] actions, realized what [he/she] was doing or what was happening around [him/her], and did not act because of ignorance, mistake or accident.

An act or failure to act is “willful” if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law. Thus, if [defendant] acted in good faith, [he/she] cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

Intent or knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] knew or intended at a particular time, you may consider any statements made or acts done or omitted by [defendant] and all

other facts and circumstances received in evidence that may aid in your determination of [defendant]'s knowledge or intent. You may infer, but you certainly are not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

Phone calls designed to lull a victim into a false sense of security, postpone injuries or complaints, or make the transaction less suspect are phone calls in furtherance of a scheme to defraud.

It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme or that the material transmitted by wire was itself false or fraudulent or that the alleged scheme actually succeeded in defrauding anyone or that the use of wire communications facilities in interstate commerce was intended as the specific or exclusive means of accomplishing the alleged fraud.

What must be proven beyond a reasonable doubt is that [defendant] knowingly devised or intended to devise a scheme to defraud that was substantially the same as the one alleged in the indictment; and that the use of the wire communications facilities in interstate [or foreign] commerce on or about the date alleged was closely related to the scheme because [defendant] either made or caused an interstate [or foreign] telephone call to be made in an attempt to execute or carry out the scheme. To "cause" an interstate [or foreign] telephone call to be made is to do an act with knowledge that an interstate [or foreign] telephone call will follow in the ordinary course of business or where such a call can reasonably be foreseen.

Comment

(1) See the Comments to Instruction 4.18.1341 (Mail Fraud). "The mail and wire fraud statutes share the same language in relevant part" and are therefore subject to the same analysis. Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987); accord McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc., 904 F.2d 786, 791 n.8 (1st Cir. 1990) (same). "Accordingly, . . . caselaw construing § 1341 is instructive for purposes of § 1343." United States v. Fermin Castillo, 829 F.2d 1194, 1198 (1st Cir. 1987).

(2) "[U]se of the wires must be 'incident to an essential part of the scheme.'" United States v. Lopez, 71 F.3d 954, 961 (1st Cir. 1995) (quoting Pereira v. United States, 347 U.S. 1, 8 (1954)). That concept is construed broadly, however, and includes use of the wires to "lull victims into a sense of false security, [and] postpone their ultimate complaint to the authorities." Id. (quoting United States v. Lane, 474 U.S. 438, 451-52 (1986) (Lane actually reads "false sense of security")).

(3) In United States v. Blastos, 258 F.3d 25, 27 (1st Cir. 2001), the defendant argued that the previous pattern charge was inadequate under Neder v. United States, 527 U.S. 1 (1999), because the instruction did not identify materiality as a separate element of the offense. (Neder had not yet been decided when the first patterns were published.) The First Circuit assumed arguendo that was so, but found it harmless error in light of the rest of the charge on materiality, noting "that the district court gave an instruction on materiality that, although it did not meet the specific requirements of Neder, accomplished the same purpose." Blastos, 258 F.3d at 29. The revised pattern still does not list

materiality as a separate element because it seems most logical to treat it as part of the definition of “defraud” or “false or fraudulent pretenses.” An argument can be made in light of Blastos, however, that it is safer to separate out materiality as a separate numbered element of the offense. The instruction then presumably would add a new “Second” namely, “The use of false statements, assertions, half-truths, or knowing concealments, concerning material facts or matters;” and the other elements would be renumbered accordingly.

[Defendant] is charged with bank fraud. It is against federal law to engage in such conduct against certain financial institutions. For you to find [defendant] guilty of this crime you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, a scheme, substantially as charged in the indictment, to defraud a financial institution [or to obtain a financial institution's money by means of false or fraudulent pretenses];

Second, [defendant]'s knowing and willful participation in this scheme with the intent to defraud [or to obtain money by means of false or fraudulent pretenses];

Third, the financial institution was federally insured or was a federal reserve bank or a member of the federal reserve system.

A scheme includes any plan, pattern or course of action. The term “defraud” means to deceive the bank in order to obtain money or other property by misrepresenting or concealing a material fact. It includes a scheme to deprive another of the intangible right of honest services.

[The term “false or fraudulent pretenses” means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth and that were made with the intent to defraud. They include actual, direct false statements as well as half- truths and the knowing concealment of facts.]

A “material” fact or matter is one that has a natural tendency to influence or be capable of influencing the decision of the decisionmaker to whom it was addressed.

[Defendant] acted “knowingly” if [he/she] was conscious and aware of [his/her] actions, realized what [he/she] was doing or what was happening around [him/her], and did not act because of ignorance, mistake or accident.

An act or failure to act is “willful” if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

Intent or knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] knew or intended at a particular time, you may consider any statements made or acts done or omitted by [defendant] and all other facts and circumstances received in evidence that may aid in your determination of [defendant]'s knowledge or intent. You may infer, but you certainly are not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

The government need not prove that the scheme was successful, that the financial institutions suffered a financial loss, that the defendant knew that the victim of the scheme was a federally insured financial

institution [federal reserve bank; member of the federal reserve system] or that the defendant secured a financial gain.

Comment

(1) This instruction is based largely on United States v. Kenrick, 221 F.3d 19, 26-29 (1st Cir. 2000) (en banc). Accord United States v. Brandon, 17 F.3d 409, 424-28 (1st Cir. 1994); United States v. Benjamin, 252 F.3d 1 (1st Cir. 2001). Kenrick concluded that intent to harm is not required. United States v. Moran, No. 00-2097, 2002 WL 31086297, at *10 (1st Cir. Sept. 23, 2002), confirmed that a defendant's conduct need not directly induce the bank to disburse funds.

(2) See the Comments to Instruction 4.18.1341 (Mail Fraud).

(3) If more than one scheme is charged in a particular count, the jury should be instructed that it has to make a unanimous finding with respect to a particular scheme. United States v. Puerta, 38 F.3d 34, 40-41 (1st Cir. 1994).

(4) The prosecution need not prove that the defendant knew the financial institution's status; it is sufficient for the prosecutor to prove the objective fact that the institution was insured. Brandon, 17 F.3d at 425.

(5) In United States v. Blastos, 258 F.3d 25, 27 (1st Cir. 2001), the defendant argued that the previous pattern charge was inadequate under Neder v. United States, 527 U.S. 1 (1999), because the instruction did not identify materiality as a separate element of the offense. (Neder had not yet been decided when the first patterns were published.) The First Circuit assumed arguendo that was so, but found it harmless error in light of the rest of the charge on materiality, noting "that the district court gave an instruction on materiality that, although it did not meet the specific requirements of Neder, accomplished the same purpose." Blastos, 258 F.3d at 29. The revised pattern still does not list materiality as a separate element because it seems most logical to treat it as part of the definition of "defraud" or "false or fraudulent pretenses." An argument can be made in light of Blastos, however, that it is safer to separate out materiality as a separate numbered element of the offense. The instruction then presumably would add a new "Second" namely, "The use of false statements, assertions, half-truths, or knowing concealments, concerning material facts or matters;" and the other elements would be renumbered accordingly. In United States v. Moran, No. 00-2097, 2002 WL 31086297, at *7 (1st Cir. Sept. 23, 2002), the court said that "the government must show that the defendants: (1) engaged in a scheme or artifice to defraud or obtain money by means of materially false statements or misrepresentations; (2) from a federally insured financial institution; and, (3) did so knowingly.

**4.18.1546 False Statements in Document Required by Immigration Law,
18 U.S.C. § 1546(a)**

[Updated: 2/11/03]

[Defendant] is charged with making a false statement under oath in a document required by federal immigration laws. It is against federal law to make a false statement under oath in a document required by federal immigration laws. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that [defendant] knowingly made a material false statement under oath;

Second, that [defendant] made the statement voluntarily and intentionally; and

Third, that [defendant] made the statement in an immigration form [identify number and title of document].

A false statement is made “knowingly” if [defendant] knew that it was false or demonstrated a reckless disregard for the truth with a conscious purpose to avoid learning the truth.

The statement is “material” if it has a natural tendency to influence or to be capable of influencing the decision of the decisionmaker to which it was addressed.

A statement is “false” if it is untrue when made.

[Defendant] is charged with making a false declaration in [his/her] grand jury testimony. It is against federal law to knowingly make a false material declaration to the grand jury while under oath.

For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that [defendant] was under oath as a witness before the Grand Jury of this Court;

Second, that [defendant] made a false declaration that was material to the grand jury's investigation; and

Third, that at the time [defendant] made the false declaration, [he/she] knew the declaration was false.

A declaration is false if it is untrue when made.

A declaration is "material" to the grand jury's investigation if it is capable of affecting or influencing the grand jury inquiry or decision. It is not necessary for the government to prove that the grand jury was, in fact, misled or influenced in any way by the false declaration.

Comment

(1) The definition of materiality comes from United States v. Doherty, 906 F.2d 41, 43-44 (1st Cir. 1990), that stated that the statement must be "material to the grand jury's investigation" but need not actually influence the grand jury. The phrase "capable of influencing" comes from United States v. Scivola, 766 F.2d 37, 44 (1st Cir. 1985) (quoting United States v. Giarratano, 622 F.2d 153, 156 (5th Cir. 1980)), a case that held that materiality can be satisfied even if the declaration only affected the credibility of a witness. United States v. Goguen, 723 F.2d 1012, 1019 (1st Cir. 1983), used slightly different language ("might have influenced"). These cases all precede the Supreme Court's holding in United States v. Gaudin, 515 U.S. 506 (1995), and then specifically in Johnson v. United States, 520 U.S. 461, 465 (1997) ("[T]here is no doubt that materiality is an element of perjury under § 1623. . . . Gaudin therefore dictates that materiality be decided by the jury, not the court."), that the question of materiality is for the jury. However, the language of the First Circuit cases still seems pertinent.

(2) The Fifth Circuit pattern charge has the following additional language that may sometimes be appropriate, but for which we have found no caselaw:

If you should find that a particular question was ambiguous or capable of being understood in two different ways, and that [defendant] truthfully answered one reasonable interpretation of the question under the circumstances presented, then such answer would not be false. Similarly, if you should find that the question was clear,

but the answer was ambiguous, and that one reasonable interpretation of the answer would be truthful, then the answer would not be false.

[Defendant] is charged with stealing trade secrets. It is against federal law to steal trade secrets. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that [defendant] knowingly [stole; took without permission; copied without permission; downloaded without permission; received while knowing it was stolen or taken without permission] a trade secret;

Second, that the trade secret was related to or included in a product produced for or placed in interstate or foreign commerce;

Third, that [defendant] had the intent of economically benefiting someone other than the trade secret's owner; and

Fourth, that [defendant] intended or knew that his action would injure the trade secret's owner.

The term "trade secret" means all forms and types of financial, business, scientific, technical, economic or engineering information, including program devices, designs, prototypes, methods, techniques, processes, procedures, programs or codes, whether tangible or intangible, and however stored if the owner has taken reasonable measures to keep the information secret and if the information derives independent economic value, actual or potential, from not being generally known to or readily ascertainable through proper means, by the public.

The term "interstate commerce" means trade or travel from one state to another.

**4.18.1951 Interference with Commerce by Robbery or Extortion (Hobbs Act),
18 U.S.C. § 1951**

[Updated: 6/14/02]

[Defendant] is accused of obstructing, delaying and affecting commerce by committing [robbery; extortion]. It is against federal law to obstruct, delay or affect commerce by committing [robbery; extortion]. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] knowingly and willfully obtained property from [person or corporation robbed/extorted];

Second, that [defendant] did so by means of [robbery; extortion];

Third, that [defendant] knew that [person or corporation robbed/extorted or its employees] parted with the property because of the [robbery; extortion]; and

Fourth, that the [robbery; extortion] affected commerce.

It is not necessary for you to find that [defendant] knew or intended that [his/her] actions would affect commerce. It is only necessary that the natural consequences of the acts committed by [defendant] as charged in the indictment would affect commerce in any way or degree. The term “commerce” means commerce between any point in a state and any point outside the state.

“Robbery” means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his or her will, by means of actual or threatened force, or violence, or fear of injury to his or her person or property, or property in his or her custody or possession, or of anyone in his or her company at the time.

“Extortion” means the obtaining of property from another with his or her consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right.

Comment

(1) In a color-of-official-right extortion case, the government must prove that the payee accepted the money knowing it was designed to influence his or her actions, but does not have to prove an affirmative act of inducement by the official. Evans v. United States, 504 U.S. 255, 268 (1992) (“[F]ulfillment of the quid pro quo is not an element of the offense.”). In the case of political or campaign contributions to elected public officials, however, the government must prove that “the payments are made in return for an explicit promise or understanding by the official to perform or not to perform an official act.” McCormick v. United States, 500 U.S. 257, 273 (1991).

(2) The “fear” element of extortion can include fear of economic loss. United States v. Sturm, 870 F.2d 769, 771-72 (1st Cir. 1989) (addressing creditor’s fear of non-repayment). For an instruction on

that issue, see United States v. Capo, 817 F.2d 947, 951 (2d Cir. 1987). If the extortion is economic fear, the term “wrongful” must be defined to require that the government prove that the defendant did not have a claim of right to the property, Sturm, 870 F.2d at 772-73, and that the defendant knew that he or she was not legally entitled to the property obtained. Id. at 774-75; see also United States v. Tormos-Vega, 959 F.2d 1103, 1109-10 (1st Cir. 1992).

(3) Section 1951 has its own conspiracy provision and does not require an overt act. Tormos-Vega, 959 F.2d at 1115.

(4) For elaboration on what it means to affect commerce, see Tormos-Vega, 959 F.2d at 1112-13. The definition of “commerce” should be modified according to the facts of the case within the range provided by 18 U.S.C. § 1951(b)(3). United States v. McKenna, 889 F.2d 1168, 1171 (1st Cir. 1989), states:

The district court must determine if, as a matter of law, interstate commerce could be affected. If the court determines it could be, the question is turned over to the jury to determine if, as a matter of fact, interstate commerce was affected as the district court charged it could have been.

It is error to instruct the jury that as a matter of law a business is engaged in interstate commerce. United States v. Balsam, 203 F.3d 72, 89 (1st Cir. 2000).

[Defendant] is charged with a violating the Travel Act. It is against federal law to [describe offense]. For you to find the defendant guilty of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] [traveled; caused someone else to travel] from one state to another or [in foreign commerce] or [used an interstate facility];

Second, that [he/she] did so with the intent to promote, manage, establish, carry on, or facilitate an unlawful activity [here violation of . . .]; and

Third, that [he/she] later performed or attempted to perform acts in furtherance of the unlawful activity.

Comment

(1) This instruction is based on United States v. Escobar-de Jesus, 187 F.3d 148, 177 (1st Cir. 1999), and United States v. Woodward, 149 F.3d 46, 65-68 (1st Cir. 1998). There are other forms of Travel Act violations which, if charged, would change the second element in the instruction. For certain penalties, a different third element (committing a crime of violence to further an unlawful activity) would have to be charged and proven beyond a reasonable doubt. 18 U.S.C. § 1952(a)(B).

(2) “Unlawful activity” is defined in 18 U.S.C. § 1952(b). The appropriate one(s) should be selected and specified in the charge.

(3) “[F]ederal courts have correctly applied § 1952 to those individuals whose agents or employees cross state lines in furtherance of the illegal activity.” United States v. Fitzpatrick, 892 F.2d 162, 167 (1st Cir. 1989).

4.18.1956(a)(1)(A) Money Laundering? Promotion of Illegal Activity or Tax Evasion, 18 U.S.C. § 1956(a)(1)(A)

[Updated: 2/12/03]

[Defendant] is charged with violating that portion of the federal money laundering statute that prohibits certain financial transactions intended to [promote specified unlawful activity; evade federal income taxes]. It is against federal law to engage in such conduct. For [defendant] to be convicted of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] entered into a financial transaction or transactions, on or about the date alleged, with a financial institution engaged in interstate commerce;

Second, that the transaction involved the use of proceeds of unlawful activities, specifically, proceeds of the [_____];

Third, that [defendant] knew that these were the proceeds of some kind of crime that amounts to a state or federal felony; and

Fourth, that [defendant] entered into the transaction or transactions with the intent to [promote the carrying on of specified unlawful activity; evade federal income taxes].

A [withdrawal; deposit; transfer; etc.] of funds from a bank is a financial transaction.

“Proceeds” means any property, or any interest in property, that someone acquires or retains as a result of the commission of the unlawful activity.

“Promote” means to further, to help carry out, or to make easier.

Knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] knew or intended at a particular time, you may consider any statements made or acts done or omitted by [defendant] and all other facts and circumstances received in evidence that may aid in your determination of [defendant]’s knowledge or intent. You may infer, but you are certainly not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

Comment

(1) The specified unlawful activities are listed in 18 U.S.C. § 1956 (c)(7).

(2) “[T]he defendant need not know exactly what crime generated the funds involved in a transaction, only that the funds are the proceeds of some kind of crime that is a felony under Federal or State law.” United States v. Isabel, 945 F.2d 1193, 1201 n.13 (1st Cir. 1991) (quoting S. Rep. No.

433, 99th Cong., 2d Sess. 12 (1986)) (alteration in original); 18 U.S.C. § 1956 (c)(1); United States v. Corchado-Peralta, -- F.3d -- (1st Cir. 2003), 2003 WL 187240 at *3, Jan. 29, 2003. A willful blindness instruction may be appropriate. United States v. Rivera-Rodriguez, -- F.3d -- (1st Cir. 2003), 2003 WL 187248 at *2, Jan. 29, 2003. Moreover, the government is not required to specify the predicate offense in the indictment, United States v. McGauley, 279 F.3d 62, 77 n15 (1st Cir. 2002), or to secure a conviction on the underlying unlawful activity. United States v. Richard, 234 F.3d 763, 768 (1st Cir. 2000).

(3) “Sole or exclusive intent to evade taxes is not required. . . .” United States v. Zanghi, 189 F.3d 71, 78 (1st Cir. 1999).

(4) It is not a defense that legitimate funds are also involved, and there is no de minimis exception. United States v. McGauley, 279 U.S. F.3d 62, 71 (1st Cir. 2002).

(5) The statute, 18 U.S.C. §1956(c)(4), has a number of “commerce” requirements, and the instruction should choose the appropriate one. Some interstate commerce involvement is required, although a minimal effect is sufficient. United States v. Owens, 167 F.3d 739, 755 (1st Cir. 1999). Federal insurance of bank deposits is sufficient. 18 U.S.C. § 1956 (c)(6)(A), cross-referencing 33 U.S.C. § 5312 (a)(2); United States v. Benjamin, 252 F.3d 1, 9 (1st Cir. 2001).

(6) Consult the statute for lengthy definitions of “transaction” and “financial transaction,” as well as subsidiary terminology like “monetary instruments” and “financial institution” and choose the appropriate terms. In United States v. Richard, 234 F.3d 763, 768 (1st Cir. 2000), the court stated: “giving criminally derived checks to a co-conspirator, who deposits them into a bank account, is a transfer to, and involves the use of, a financial institution, which satisfies the definition of “monetary transaction” in section 1957(f)(1) [similar, for these purposes, to § 1956]. Further, transferring funds to a co-conspirator involves monetary instruments, namely the currency or checks involved, which satisfies section 1956(c)(5).

4.18.1956(a)(1)(B)(i)**Money Laundering—Illegal Concealment,
18 U.S.C. § 1956(a)(1)(B)(i)**

[Updated: 2/12/03]

[Defendant] is charged with violating that portion of the federal money laundering statute that prohibits concealment of the proceeds of certain unlawful activities. It is against federal law to engage in such concealment. For [defendant] to be convicted of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] entered into a financial transaction or transactions, on or about the date alleged, with a financial institution engaged in interstate commerce;

Second, that the transaction involved the use of proceeds of unlawful activities, specifically, proceeds of the [_____];

Third, that [defendant] knew that these were the proceeds of some kind of crime that amounts to a state or federal felony; and

Fourth, that [defendant] knew that the transaction or transactions were designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of that specified unlawful activity.

A [withdrawal; deposit; transfer; etc.] of funds from a bank is a financial transaction.

Knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] knew or intended at a particular time, you may consider any statements made or acts done or omitted by [defendant] and all other facts and circumstances received in evidence that may aid in your determination of [defendant]'s knowledge or intent. You may infer, but you are certainly not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

Comment

(1) The specified unlawful activities are listed in 18 U.S.C. § 1956 (c)(7).

(2) “[T]he defendant need not know exactly what crime generated the funds involved in a transaction, only that the funds are the proceeds of some kind of crime that is a felony under Federal or State law.” United States v. Isabel, 945 F.2d 1193, 1201 n.13 (1st Cir. 1991) (quoting S. Rep. No. 433, 99th Cong., 2d Sess. 12 (1986)) (alteration in original); 18 U.S.C. § 1956 (c)(1); United States v. Corchado-Peralta, -- F.3d -- (1st Cir. 2003), 2003 WL 187240 at *3, Jan. 29, 2003. A willful blindness instruction may be appropriate. United States v. Rivera-Rodriguez, -- F.3d -- (1st Cir. 2003), 2003 WL 187248 at *2, Jan. 29, 2003. Moreover, the government is not required to specify the predicate offense in the indictment, United States v. McGauley, 279 F.3d 62, 77 n15 (1st Cir.

2002), or to secure a conviction on the underlying unlawful activity. United States v. Richard, 234 F.3d 763, 768 (1st Cir. 2000).

(3) “To prove a violation of 18 U.S.C. § 1956(a)(1)(B)(i), the government must show that [the defendant] conducted financial transactions involving the proceeds of unlawful activity, knowing that the transactions involved the proceeds of unlawful activity, and that the transactions were designed ‘to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.’” United States v. McGauley, 279 F.3d 62, 69 (1st Cir. 2002) (quoting 18 U.S.C. § 1956(a)(1)(B)(i)). “The knowledge requirement under 18 U.S.C. § 1956(a)(1)(B)(i) is twofold: the government must demonstrate (i) that the defendant knew that the funds involved in the financial transaction were the proceeds of some unlawful activity; and (ii) that he knew that the transaction itself was ‘designed in whole or in part to conceal the nature, location, source, ownership, or control of the proceeds of such unlawful activity.’” United States v. Frigerio-Migiano, 254 F.3d 30, 33 (1st Cir. 2001). “Where the defendant is someone other than the source of the illegal proceeds . . . , the statute is concerned with [the defendant’s] knowledge of the source’s intent in the transaction.” United States v. Martinez-Medina, 279 F.3d 105, 115 (1st Cir. 2002). Purchases of goods and deposits of money are not alone sufficient to meet the requirement that a defendant know that a transaction is designed to disguise or conceal, at least where that defendant is not otherwise involved in the illegal conduct. The First Circuit vacated a conviction where, although the spouse knew that her husband’s income was tainted, there was no proof of the design element as to her expenditures, purchases and deposits. United States v. Corchado-Peralta, -- F.3d -- (1st Cir. 2003), 2003 WL 187240 at *4, Jan. 29, 2003.

(4) It is not a defense that legitimate funds are also involved, and there is no de minimis exception. United States v. McGauley, 279 U.S. F.3d 62, 71 (1st Cir. 2002).

(5) The statute, 18 U.S.C. § 1956(c)(4), has a number of “commerce” requirements, and the instruction should choose the appropriate one. Some interstate commerce involvement is required, although a minimal effect is sufficient. United States v. Owens, 167 F.3d 739, 755 (1st Cir. 1999). Federal insurance of bank deposits is sufficient. 18 U.S.C. § 1956 (c)(6)(A), cross-referencing 33 U.S.C. § 5312 (a)(2); United States v. Benjamin, 252 F.3d 1, 9 (1st Cir. 2001).

(6) Consult the statute for lengthy definitions of “transaction” and “financial transaction,” as well as subsidiary terminology like “monetary instruments” and “financial institution” and choose the appropriate terms. In United States v. Richard, 234 F.3d 763, 768 (1st Cir. 2000), the court stated: “giving criminally derived checks to a co-conspirator, who deposits them into a bank account, is a transfer to, and involves the use of, a financial institution, which satisfies the definition of “monetary transaction” in section 1957(f)(1) [similar, for these purposes, to § 1956]. Further, transferring funds to a co-conspirator involves monetary instruments, namely the currency or checks involved, which satisfies section 1956(c)(5).

4.18.1956(a)(1)(B)(ii)

**Money Laundering—Illegal Structuring,
18 U.S.C. § 1956(a)(1)(B)(ii)**

[Updated: 2/12/03]

[Defendant] is charged with violating that portion of the federal money laundering statute that prohibits structuring transactions to avoid reporting requirements. It is against federal law to engage in such conduct. For [defendant] to be convicted of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] entered into a financial transaction or transactions, on or about the date alleged, with a financial institution engaged in interstate commerce, involving the use of proceeds of unlawful activities, specifically, proceeds of the [_____];

Second, that [defendant] knew that these were the proceeds of unlawful activity;

Third, that [defendant] knew that the transaction or transactions were structured or designed in whole or in part so as to avoid transaction reporting requirements under federal law.

A [withdrawal; deposit; transfer; etc.] of funds from a bank is a financial transaction.

Federal law requires that [withdrawal; deposit; transfer; etc.] of a sum of more than \$10,000 cash [from; into] a bank account in a single business day be reported by the bank to the Internal Revenue Service.

Knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] knew or intended at a particular time, you may consider any statements made or acts done or omitted by [defendant] and all other facts and circumstances received in evidence that may aid in your determination of [defendant]'s knowledge or intent. You may infer, but you are certainly not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

Comment

(1) “[T]he defendant need not know exactly what crime generated the funds involved in a transaction, only that the funds are the proceeds of some kind of crime that is a felony under Federal or State law.” United States v. Isabel, 945 F.2d 1193, 1201 n.13 (1st Cir. 1991) (quoting S. Rep. No. 433, 99th Cong., 2d Sess. 12 (1986)) (alteration in original).

(2) The requirements for withdrawal/deposit transaction reporting are set forth at 31 U.S.C. § 5313; 31 C.F.R. § 103.22 (1997).

(3) The statute, 18 U.S.C. §1956(c)(4), has a number of “commerce” requirements, and the instruction should choose the appropriate one. Some interstate commerce involvement is required, although a minimal effect is sufficient. United States v. Owens, 167 F.3d 739, 755 (1st Cir. 1999).

(4) If there is a criminal forfeiture count pursuant to 18 U.S.C. § 982(a)(1), see United States v. McGauley, 279 F.3d 62, 75-76 (1st Cir. 2002), for instruction language on “involved” or “traceable” property.

4.18.1957 Money Laundering—Engaging in Monetary Transactions in Property Derived From Specified Unlawful Activity, 18 U.S.C. § 1957

[Updated: 2/12/03]

[Defendant] is charged with knowingly engaging [or attempting to engage] in a monetary transaction involving more than \$10,000 of criminally derived property. It is against federal law to engage in such activity. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of the following beyond a reasonable doubt:

First, that [defendant] [deposited; withdrew; exchanged funds] [or attempted to deposit; withdraw; exchange funds] over \$10,000 in a financial institution affecting interstate commerce on the date specified;

Second, [he/she] knew that the [money; deposit; etc.] came from some kind of criminal offense;

Third, the [money; deposit; etc.] was in fact criminally derived from [unlawful specified activity]; and

Fourth, the [unlawful specified activity] took place in the United States.

“Affecting interstate commerce” means that the transaction affected commerce in any way or degree; a minimal effect is sufficient [deposit in an FDIC-insured bank is sufficient].

The government does not have to prove that [defendant] knew that the money was derived from the [specified unlawful activity] or that [defendant] committed the [specified unlawful activity]. It is enough that [defendant] had general knowledge that the [money; deposit; etc.] came from some kind of criminal offense.

Comments

(1) The enumeration of the elements of this crime is based on United States v. Benjamin, 252 F.3d 1 (1st Cir. 2001) and United States v. Richard, 234 F.3d 763 (1st Cir. 2000).

(2) “Section 1957(f) only requires that the transactions have a de minimis effect on commerce.” Benjamin, 252 F.3d at 9 (The bank’s certificate of insurance issued by the FDIC, “certifying that the bank is federally insured, suffices to satisfy the requirement that the transactions has at least a minimum impact on interstate commerce.”). The Benjamin court approved an instruction defining monetary transaction as “deposit [etc.] . . . in or affecting interstate or foreign commerce.” Id. at 10. For the district court’s full instruction on the definition of interstate commerce, see id.

(3) Acquittal on the underlying unlawful activity does not preclude a conviction for money laundering. See Richard, 234 F.3d at 768; see also United States v. Whatley, 133 F.3d 601, 605-06 (8th Cir. 1998). Section 1957 money laundering does not require that the defendant committed the underlying offense. Benjamin, 252 F.3d at 7; Richard, 234 F.3d at 768. It also does not require that

the defendant know that the money came from specified unlawful activity, only that the defendant knew that the property was criminally derived. Richard, 234 F.3d at 768.

(4) “[G]iving criminally derived checks to a co-conspirator, who deposits them into a bank account, is a transfer to, and involves the use of, a financial institution, which satisfies the definition of ‘monetary transaction’ in section 1957(f)(1). Further, transferring funds to a co-conspirator involves monetary instruments, namely the currency or checks involved, which satisfies section 1956(c)(5).” Richard, 234 F.3d at 768.

(5) If there is a criminal forfeiture count pursuant to 18 U.S.C. § 982(a)(1), see United States v. McGauley, 279 F.3d 62, 75-76 (1st Cir. 2002), for instruction language on “involved” or “traceable” property.

4.18.2113(a) Unarmed Bank Robbery, 18 U.S.C. § 2113(a)

[Updated: 6/14/02]

[Defendant] is accused of robbing the [bank; savings and loan association; credit union]. It is against federal law to rob a federally insured [bank; savings and loan association; credit union]. For you to find the defendant guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that [defendant] intentionally took money belonging to the [bank; savings and loan association; credit union], from a [bank; savings and loan association; credit union] employee or from the [bank; savings and loan association; credit union] while a [bank; savings and loan association; credit union] employee was present;

Second, that [defendant] used intimidation or force and violence when [he/she] did so; and

Third, that at that time, the deposits of the [bank; savings and loan association; credit union] were insured by the [_____]. [The parties have so stipulated].

“Intimidation” is actions or words used for the purpose of making someone else fear bodily harm if he or she resists. The actual courage or timidity of the victim is irrelevant. The actions or words must be such as to intimidate an ordinary, reasonable person.

Comment

(1) Subjective intent to steal (*i.e.*, knowledge by the defendant that he or she has no claim to the money) is not a required element under 18 U.S.C. § 2113(a). United States v. DeLeo, 422 F.2d 487, 490-91 (1st Cir. 1970).

(2) See the Comments to Instruction 4.18.2113(a) and (d) (Armed or Aggravated Bank Robbery).

4.18.2113(a),(d)**Armed or Aggravated Bank Robbery,
18 U.S.C. § 2113(a) & (d)**

[Updated: 6/14/02]

[Defendant] is accused of robbing the [bank; savings and loan association; credit union]. It is against federal law to rob a federally insured [bank; savings and loan association; credit union]. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that [defendant] intentionally took money belonging to the [bank; savings and loan association; credit union] from a [bank; savings and loan association; credit union] employee or from the [bank; savings and loan association; credit union] while a [bank; savings and loan association; credit union] employee was present;

Second, that [defendant] used intimidation or force and violence when [he/she] did so;

Third, that at that time, the deposits of the [bank; savings and loan association; credit union] were insured by the [_____]. [The parties have so stipulated]; and

Fourth, that [defendant], by using a dangerous weapon or device, assaulted someone or put someone's life in jeopardy.

“Intimidation” is actions or words used for the purpose of making someone else fear bodily harm if he or she resists. The actual courage or timidity of the victim is irrelevant. The actions or words must be such as to intimidate an ordinary, reasonable person.

“Assault” means to threaten bodily harm with an apparent present ability to succeed, where the threat is intended to and does generate a reasonable apprehension of such harm in a victim. The threat does not have to be carried out.

Lesser Offense, 18 U.S.C. § 2113(a)

If you find [defendant] not guilty of this charge, you must proceed to consider whether the defendant is guilty of the lesser offense of robbing a [bank; savings and loan association; credit union] without either an assault or jeopardizing someone's life with a dangerous weapon. The lesser offense requires the government to prove beyond a reasonable doubt the first, second and third, but not the fourth, things I have described. In other words, the government must prove everything except using a dangerous weapon to assault someone or jeopardize someone's life.

Comment

(1) Subjective intent to steal (*i.e.*, knowledge by the defendant that he or she has no claim to the money) is not a required element under 18 U.S.C. § 2113(a) & (d). United States v. DeLeo, 422 F.2d 487, 490-91 (1st Cir. 1970).

(2) In some cases it may be appropriate to charge that possession of recently stolen property may support an inference of participation in the theft of the property. See United States v. Rose, 104 F.3d 1408, 1413 (1st Cir. 1997). The inference is permissible, not mandatory or a presumption. Id.

(3) “[B]y using a dangerous weapon or device” modifies both the “assaulted” and “put someone’s life in jeopardy” language of § 2113(d). Simpson v. United States, 435 U.S. 6, 13 n.6 (1978). This part of Simpson is not affected by the Comprehensive Crime Control Act of 1984, 18 U.S.C. § 924(c)(1).

(4) An unloaded gun is a dangerous weapon. McLaughlin v. United States, 476 U.S. 16, 17-18 (1986). Whether some other weapon or device is dangerous is generally a question of fact for the jury. See Federal Judicial Center Instruction 105, commentary at 146; Eighth Circuit Instruction 6.18.2113B, commentary at 375 n.4; United States v. Benson, 918 F.2d 1, 2-4 (1st Cir. 1990) (upholding bench trial decision that movement of hand inside a pocket, revealing a metallic object that a teller could reasonably believe to be a gun (actually a knife) and telling the teller that it was a gun, amounts to use of a dangerous weapon or device); United States v. Cannon, 903 F.2d 849, 854 (1st Cir. 1990) (approving instruction that toy gun “may be dangerous if it instills fear in the average citizen, creating an immediate danger that a violent response will follow”).

(5) The instruction on the lesser offense of unarmed bank robbery should be given if there is a factual dispute over use of a weapon and a jury finding of the lesser-included offense would not be irrational. United States v. Ferreira, 625 F.2d 1030, 1031-33 (1st Cir. 1980). The defendant, however, can waive the right to a lesser-included offense charge. United States v. Lopez Andino, 831 F.2d 1164, 1171 (1st Cir. 1987) (criminal civil rights charges).

(6) If an aiding and abetting charge is given for armed bank robbery, the jury should be instructed that the shared knowledge requirement, see Instruction 4.18.02 (Aid and Abet), extends to both the robbery and the understanding that a weapon would be used. Knowledge includes notice of the “likelihood” of a weapon’s use—apparently something more than simple constructive knowledge, but less than actual knowledge. United States v. Spinney, 65 F.3d 231, 236-37 (1st Cir. 1995). “[A]n enhanced showing of constructive knowledge will suffice.” Id. at 237.

(7) “Proof of federal insurance at the time of the robbery is an essential element for conviction under 18 U.S.C. § 2113,” and the First Circuit has admonished the government to pay more attention to the temporal requirement in meeting the evidentiary burden. United States v. Judkins, 267 F.3d 22, 23 & n.1 (1st Cir. 2001).

[Defendant] is charged with carjacking. It is against federal law to take a motor vehicle by force and violence or intimidation with intent to cause death or serious bodily injury. For you to find the defendant guilty of this crime you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] knowingly took a motor vehicle from [name] by force and violence or by intimidation;

Second, that the motor vehicle previously had been transported, shipped, or received across state or national boundaries;

Third, that [defendant] intended to cause death or seriously bodily harm at the time [he/she] demanded or took control of the motor vehicle; [and]

Fourth, that serious bodily injury [death] resulted].

“Intimidation” is actions or words used for the purpose of making someone else fear bodily harm if he or she resists. The actual courage or timidity of the victim is irrelevant. The actions or words must be such as to intimidate an ordinary, reasonable person.

“Bodily injury” means a cut, abrasion, bruise, burn, disfigurement, physical pain, illness; or impairment of the function of a bodily member, organ or mental faculty; or any other injury to the body, no matter how temporary.

“Serious bodily injury” means bodily injury that involves a substantial risk of death or extreme physical pain or protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty. It “resulted” from the carjacking if it was caused by the actions of the carjacker at any time during the commission of the carjacking.

“Knowingly” means that the act was done voluntarily and intentionally and not because of mistake or accident.

Comment

(1) The fourth element affects the available sentence. Under Jones v. United States, 526 U.S. 227, 252 (1999), unless the aggravating conduct is charged and proven beyond a reasonable doubt as part of the offense, the sentence enhancements will not apply (maximum of 15 years without the fourth element; maximum of 25 years if serious bodily injury results; maximum of life imprisonment or death if death results). 18 U.S.C. § 2119(1)-(3).

(2) According to United States v. Rosario-Diaz, 202 F.3d 54, 63 (1st Cir. 2000), the Supreme Court held in Holloway v. United States, 526 U.S. 1, 8 (1999), that “the mental state required by the

statute ('intent to cause death or serious bodily harm') is measured at the moment that the defendant demands or takes control of the vehicle. The focus of the statute is narrow." The intent may be conditional or unconditional. In other words, it is sufficient that the defendant intends to cause death or serious bodily harm only in the face of resistance by the victim. Holloway, 526 U.S. at 7-10. If the charge is aiding and abetting, "the government must prove that the [aiding and abetting] defendant intended to cause death or serious bodily injury." United States v. Otero-Mendez, 273 F.3d 46, 52 (1st Cir. 2001). The First Circuit has not decided whether that means to a "practical certainty" or only that the defendant be "on notice." Id. at 52. It has also described the scope of aider and abettor liability as "interesting" and "intriguing" and the case law as "remarkably silent." Ramirez-Burgos v. United States, 313 F.3d 23, 31 (1st Cir. 2002).

(3) The word "knowingly" is inserted because of this language in United States v. Rivera-Figueroa, 149 F.3d 1, 4 (1st Cir. 1998) (internal citations omitted): "[W]e may assume that a defendant who 'takes a motor vehicle' must know what he is doing, and that this knowledge must be possessed by a defendant who merely directs another to act (and so is liable as a principal), or assists the taker (and is so liable as an aider and abettor). But nothing in the statute requires that the taking be an ultimate motive of the crime. It is enough that the defendant be aware that the action in which he is engaged, whether by himself or through direction or assistance to another, involves the taking of a motor vehicle."

(4) The definitions of bodily injury and serious bodily injury come from 18 U.S.C. § 1365(g)(3), cross-referenced in the carjacking statute. The list should be shortened to the ones pertinent to the offense charged. If the conduct is within the special maritime and territorial jurisdiction, certain sex offenses are also included. 18 U.S.C. §§ 2241-42. The definition of "resulted" comes from Ramirez-Burgos v. United States, 313 F.3d 23, 30 n.9 (1st Cir. 2002), where the court also said: "We do not here set forth the temporal limits of a carjacking under § 2119. But we reaffirm, without hesitation, the commission of a carjacking continues at least while the carjacker maintains control over the victim and her car."

(5) The statute requires that the motor vehicle have been transported, shipped or received in interstate or foreign commerce. "Commerce" is defined in 18 U.S.C. § 10 as respectively "commerce between one State, Territory, Possession, or the District of Columbia, and another State, Territory, Possession, or the District of Columbia" or "commerce with a foreign country." "The jurisdictional element of 18 U.S.C. § 2119 requires that the government prove that the car in question has been moved in interstate commerce, at some time." Otero-Mendez, 273 F.3d at 51.

(6) In cases of interpretive difficulty, it may be helpful to remember that the Supreme Court has said that the carjacking statute is modeled on three other statutes? 18 U.S.C. § 2111, 2113 and 2118. Jones, 526 U.S. at 235 & n.4.

[Defendant] is accused of knowingly possessing child pornography that has [been mailed; moved in interstate or foreign commerce]. It is against federal law to possess child pornography that has [been mailed; moved in interstate or foreign commerce]. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that [defendant] knowingly possessed [e.g., book; videotape; computer disk];

Second, that the [_____] contained at least one image of child pornography;

Third, that [defendant] knew that [_____] contained an image of child pornography; and

Fourth, that the image of child pornography had [been mailed; moved in interstate or foreign commerce].

But if you find that [defendant]: (1) possessed fewer than three images of child pornography; and (2) promptly and in good faith took reasonable steps to destroy each such image and did not retain the image or allow any person to access the image or a copy of the image [or reported the matter to a law enforcement agency and provided that law enforcement agency access to each such image], then you shall find [defendant] not guilty. It is the government's burden to prove beyond a reasonable doubt all the elements I listed previously and, in addition, that [defendant]'s possession does not fit within the rule I have just described.

“Knowingly” means that the act was done voluntarily and intentionally and not because of mistake or accident.

“Possess” means to exercise authority, dominion or control over something. The law recognizes different kinds of possession.

[“Possession” includes both actual and constructive possession. A person who has direct physical control of something on or around his or her person is then in actual possession of it. A person who is not in actual possession, but who has both the power and the intention to exercise control over something is in constructive possession of it. Whenever I use the term “possession” in these instructions, I mean actual as well as constructive possession.]

[“Possession” [also] includes both sole possession and joint possession. If one person alone has actual or constructive possession, possession is sole. If two or more persons share actual or constructive possession, possession is joint. Whenever I have used the word “possession” in these instructions, I mean joint as well as sole possession.]

“Child pornography” is any [photograph; film; video; picture; computer image; computer-generated image], where a person under age 18 engaging in sexually explicit conduct was used to produce the [photograph; computer image; etc.].

“Sexually explicit conduct” includes any *one* of the following four categories of conduct, whether actual or simulated: (1) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex; (2) bestiality; (3) masturbation; (4) sadistic or masochistic abuse; or (5) lascivious exhibition of the genital or pubic area of any person.

Whether an image of the genitals or pubic area constitutes a “lascivious exhibition” requires a consideration of the overall content of the material. In considering the overall content of the image, you may, but are not required to, consider the following factors: (1) whether the genitals or pubic area are the focal point of the image; (2) whether the setting of the image is sexually suggestive, for example, a location generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose or inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the image suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the image appears intended or designed to elicit a sexual response in the viewer. An image need not involve all of these factors to constitute a “lascivious exhibition.” It is for you to decide the weight, or lack of weight, to be given to any of the factors I just listed. This list of factors is not comprehensive and you may consider other factors specific to this case that you find relevant.

An image has been “shipped or transported in interstate or foreign commerce” if it has been transmitted over the Internet or over telephone lines.

Comment

(1) It seems unnecessary to define “computer.” If elaboration is required, the statute provides one: “an electronic, magnetic, optical, electromechanical, or other high speed data processing device performing logical, arithmetic, or storage functions.” 18 U.S.C. § 2256(6) (referring to 18 U.S.C. § 1030(e)(1)).

(2) The instruction can easily be modified for a charge of transportation or receipt. For these charges, however, the fewer-than-three-images defense is not available. See 18 U.S.C. § 2252A(d).

(3) For juror comprehension, we have not used the statutory term “visual depiction.” Instead, we recommend replacing it with the type of image at issue in the case, *e.g.*, photograph or computer-generated image. There is a broader definition of “visual depiction” that may be appropriate in some cases. See 18 U.S.C. 2256(5).

(4) The definition of child pornography in this instruction includes only the language from 18 U.S.C. § 2256(8)(A). In Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002), the Supreme Court held subsections (B) and (D) of 18 U.S.C. § 2256(8) unconstitutional. The Court did not rule on subsection (C) – which prohibits photographs, computer images, etc. that have “been created, adapted, or modified to appear that an identifiable [person under age 18] is engaging in sexually explicit conduct” – referring to it as covering “computer morphing.” 122 S. Ct. at 1397. It said: “Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in New York v. Ferber, 458 U.S. 747

(1982)].” Id. (In Ferber the Court upheld a prohibition on distributing material that depicts a sexual performance by an actual child.) The Supreme Court added: “Respondents do not challenge this provision, and we do not consider it.” Id.

(5) The definitions of sexually explicit conduct should be pared down to those material to the actual case. They are taken largely from 18 U.S.C. § 2256. The elaboration of “lascivious” comes from United States v. Amirault, 173 F.3d 28, 31 (1st Cir. 1999).

(6) “Identifiable” is defined in 18 U.S.C. § 2256(9).

(7) “Interstate commerce” and “foreign commerce” are defined in 18 U.S.C. § 10. “Under the case law, proof of transmission of pornography over the Internet or over telephone lines satisfies the interstate commerce element of the offense.” United States v. Hilton, 257 F.3d 50, 54 (1st Cir. 2001).

(8) An alternative jurisdictional basis for the crime involves production of child pornography using materials that moved in interstate commerce. 18 U.S.C. § 2252A(a)(5)(B).

4.18.2314**Interstate Transportation of Stolen Money or Property,
18 U.S.C. § 2314**

[Updated: 6/14/02]

[Defendant] is accused of taking stolen [money; property], from [state] to [state], on or about [date]. It is against federal law to transport [money; property] from one state to another knowing that the [money; property] is stolen. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that the [money; property] was stolen;

Second, that [defendant] took the [money; property] from [state] to [state], or willfully caused it to be taken;

Third, that, when [defendant] took the [money; property] from [state] to [state], or willfully caused it to be taken, [he/she] knew that it was stolen;

Fourth, that the [money; property] [totaled; was worth] \$5,000 or more.

It does not matter whether [defendant] stole the [money; property] or someone else did. However, for you to find [defendant] guilty of this crime, it must be proven beyond a reasonable doubt that [he/she] took at least \$5,000 [worth of property] or willfully caused at least \$5,000 [worth of property] to be taken from [state] to [state] knowing it was stolen.

Comment

(1) The government must prove that a defendant caused stolen money or property to be transported; it is not necessary to prove that he or she actually transmitted or transported the money or property himself or herself. United States v. Doane, 975 F.2d 8, 11 (1st Cir. 1992).

Where liability is based on causing transportation rather than on transporting, the government must prove that the causation was “willful.” United States v. Leppo, 177 F.3d 93, 97 (1st Cir. 1999). The willfulness requirement derives from 18 U.S.C. § 2(b), not from 18 U.S.C. § 2314 itself, and applies automatically, even where the indictment makes no reference to aider and abettor liability under section 2(b). Id.

The First Circuit has left open the precise definition of the “willfulness” mental state. Ignorant causation-in-fact is not sufficient, but the court has not necessarily rejected reasonable foreseeability. See id. at 96-97. Accordingly, there is no clear guidance from the court on the proper definition of “willfully” for purposes of this statute. Trial judges may wish to use the definition proposed for 18 U.S.C. § 2(b), see Pattern Instruction 4.18.02 (Aid and Abet), unless the First Circuit clearly rules that a lesser mental state suffices.

(2) Unexplained possession of recently stolen money or property may be used to support an inference that the possessor knew it was stolen in the light of surrounding circumstances shown by evidence in the case so long as the jury is instructed that the inference is permissible, not mandatory.

United States v. Thuna, 786 F.2d 437, 444-45 (1st Cir. 1986); see also United States v. Lavoie, 721 F.2d 407, 409-10 (1st Cir. 1983) (same in context of 18 U.S.C. § 2313); cf. Freije v. United States, 386 F.2d 408, 410-11 (1st Cir. 1967) (defendants who come forward with an explanation for possession of stolen vehicles are entitled to an instruction that the explanation, if believed, negates any inference of knowledge arising from mere fact of possession). Such possession also may support an inference regarding interstate transportation. See Thuna, 786 F.2d at 444-45 (possession in one state of property recently stolen in another state, if not satisfactorily explained, is a circumstance from which a jury may infer that the person knew the property to be stolen and caused it to be transported in interstate commerce).

(3) This instruction can be modified for the transportation, transmission or transfer of stolen money or property in foreign commerce or for items converted or taken by fraud. 18 U.S.C. § 2314.

(4) This instruction also can be adapted for cases concerning the transportation of stolen vehicles. 18 U.S.C. § 2312.

(5) For cases in which the definition of “value” is important, 18 U.S.C. § 2311 defines “value” as “the face, par, or market value, whichever is the greatest.” The conventional definition of “market value” is the price that a willing buyer would pay a willing seller. See, e.g., United States v. Wentz, 800 F.2d 1325, 1326 (4th Cir. 1986); United States v. Bakken, 734 F.2d 1273, 1278 (7th Cir. 1984); United States v. Reid, 586 F.2d 393, 394 (5th Cir. 1978).

**4.21.841(a)(1)A Possession With Intent to Distribute a Controlled Substance,
21 U.S.C. § 841 (a) (1)**

[Updated: 8/12/02]

[Defendant] is accused of possessing [controlled substance] on or about [date] intending to distribute it to someone else. It is against federal law to have [controlled substance] in your possession with the intention of distributing it to someone else. For you to find [defendant] guilty of this crime you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that [defendant] on that date possessed [controlled substance], either actually or constructively;

Second, that [he/she] did so with a specific intent to distribute the [controlled substance] over which [he/she] had actual or constructive possession; and

Third, that [he/she] did so knowingly and intentionally.

It is not necessary for you to be convinced that [defendant] actually delivered the [controlled substance] to someone else, or that [he/she] made any money out of the transaction. It is enough for the government to prove, beyond a reasonable doubt, that [he/she] had in [his/her] possession what [he/she] knew was [controlled substance] and that [he/she] intended to transfer it or some of it to someone else.

[A person's intent may be inferred from the surrounding circumstances. Intent to distribute may, for example, be inferred from a quantity of drugs larger than that needed for personal use. In other words, if you find that [defendant] possessed a quantity of [controlled substance]—more than that which would be needed for personal use—then you may infer that [defendant] intended to distribute [controlled substance]. The law does not require you to draw such an inference, but you may draw it.]

The term “possess” means to exercise authority, dominion or control over something. The law recognizes different kinds of possession.

[“Possession” includes both actual and constructive possession. A person who has direct physical control of something on or around his or her person is then in actual possession of it. A person who is not in actual possession, but who has both the power and the intention to exercise control over something is in constructive possession of it. Whenever I use the term “possession” in these instructions, I mean actual as well as constructive possession.]

[“Possession” [also] includes both sole possession and joint possession. If one person alone has actual or constructive possession, possession is sole. If two or more persons share actual or constructive possession, possession is joint. Whenever I have used the word “possession” in these instructions, I mean joint as well as sole possession.]

If you find [defendant] guilty, you will also have to answer one or more questions concerning the quantity of the substance involved, which may affect the potential sentence.

Comment

(1) The enumeration of the elements of this crime is based upon United States v. Latham, 874 F.2d 852, 863 (1st Cir. 1989); see also United States v. Akinola, 985 F.2d 1105, 1109 (1st Cir. 1993).

(2) After Apprendi v. New Jersey, 530 U.S. 466 (2000), it will be necessary to get a verdict on quantity range if the government is seeking (and has appropriately charged) higher than the maximum penalties contained in the catchall penalty provision of 21 U.S.C. § 841 for the particular drug involved (20 years for substances with a cocaine base, 18 U.S.C. § 841(b)(1)(C), and 5 years for a marijuana substance, id. § 841(b)(1)(D)). See United States v. Duarte, 246 F.3d 56, 60 (1st Cir. 2001); United States v. Robinson, 241 F.3d 115, 119 (1st Cir. 2001); United States v. Caba, 241 F.3d 98, 101 (1st Cir. 2001). (The same holds true for the enhanced penalty for cases where death or serious bodily injury resulted. 21 U.S.C. § 841(b)(1)(C). The standards for the latter charge are discussed in United States v. Soler, 275 F.3d 146, 152-53 (1st Cir. 2002). Soler also discusses the standards for an enhancement case based upon nearness to a school under 21 U.S.C. § 860. Id. at 153-55.) But the First Circuit has held that even after Apprendi, quantity is not an element of the offense, and that the government needs “to prove *only* that the offense ‘involved’ a particular type and quantity of drug, not that the defendant knew that he was distributing that particular drug type and quantity.” United States v. Collazo-Aponte, 281 F.3d 320, 326 (1st Cir. 2002); accord Derman v. United States, No. 01-2545, 2002 WL 1610566, at *7 (1st Cir. July 25, 2002) (“in a drug conspiracy case, the jury should determine the existence *vel non* of the conspiracy as well as any facts about the conspiracy that will increase the possible penalty for the crime of conviction beyond the default statutory maximum; and the judge should determine, at sentencing, the particulars regarding the involvement of each participant in the conspiracy”) (footnote omitted). We suggest the following addition to the verdict form:

How much [specify controlled substance], in total, was involved? [check **only** one]

- _____ at least [specify threshold quantity to qualify for penalties in 21 U.S.C. § 841(b)(1)(A)] of [specify controlled substance]
- _____ at least [specify threshold quantity to qualify for penalties in § 841(b)(1)(B)] of [specify controlled substance]
- _____ less than [specify threshold quantity to qualify for penalties in § 841(b)(1)(B)] of [specify controlled substance]

(3) The statutory penalty provisions applicable in a marijuana case are more complicated than those applicable in cases involving other controlled substances. Section 841(b)(1)(D), which would otherwise be the default penalty provision for a marijuana charge under 21 U.S.C. § 841(a), is explicitly limited by section 841(b)(4). 21 U.S.C. § 841(b)(1)(D) (“In the case of less than 50 kilograms of marihuana . . . such person shall, except as provided in paragraph[] (4) . . . of this subsection, be sentenced to a term of imprisonment of not more than 5 years. . . .”). Section 841(b)(4) provides that a person who distributes “a small amount of marihuana for no remuneration shall be treated as provided in section 844 [the section prohibiting simple possession].” Therefore, in accord with Apprendi v. New Jersey, 530 U.S. 466 (2000), any conviction under section 841 involving marijuana must also include a determination of the applicability of section 841(b)(4). See United

States v. Lowe, 143 F. Supp. 2d 613 (S.D. W. Va. 2000) (discussing the applicability of section 841(b)(4) as the baseline penalty provision for section 841 marijuana cases); see, e.g., United States v. Miranda, 248 F.3d 434, 444-45 (5th Cir. 2001) (holding that the maximum sentence for conspiring to possess with the intent to distribute a measurable, but not specifically determined, amount of marijuana was governed by section 841(b)(4)). But see United States v. Duarte, 246 F.3d 56, 59 (1st Cir. 2001) (referring to section 841(b)(1)(D) as providing the “‘default statutory maximum’ . . . for a violation of 21 U.S.C. § 841(a)(1) involving marijuana,” without discussing section 841(b)(4)).

Additionally, one court has held that section 841(b)(4) applies only to distribution (not possession with intent to distribute) charges. United States v. Laakkonen, 149 F. Supp. 2d 315, 318-19 (W.D. Ky. 2001).

(4) “Apprendi applies only when the disputed ‘fact’ enlarges the applicable statutory maximum and the defendant’s sentence exceeds the original maximum.” Caba, 241 F.3d at 101. It does not apply to mandatory minimum sentences, Harris v. United States, 122 S. Ct. 2406 (2002), and it is not necessary to get a specific jury finding with respect to “guideline [factual] findings (including, inter alia, drug weight calculations) that increase the defendant’s sentence, but do not elevate the sentence to a point beyond the lowest applicable statutory maximum.” Caba, 241 F.3d at 101; accord United States v. Martinez-Medina, 279 F.3d 105, 122 (1st Cir. 2002) (“Apprendi does not apply to findings made for purposes of the sentencing guidelines, such as the court’s determination that the [defendants] were accountable for [several] murders.”).

(5) Quantity, see United States v. Roberts, 119 F.3d 1006, 1016-17 (1st Cir. 1997); United States v. Ocampo-Guarin, 968 F.2d 1406, 1410 (1st Cir. 1992), or quantity and purity can support an inference of intent to distribute. See United States v. Bergodere, 40 F.3d 512, 518 (1st Cir. 1994). One ounce of cocaine, however, is not sufficient to support the inference. Latham, 874 F.2d at 862-63. Other indicia of intent to distribute are scales, firearms and large amounts of cash. United States v. Ford, 22 F.3d 374, 382-83 (1st Cir. 1994).

(6) The defendant’s intent to distribute must relate specifically to the controlled substance in his or her possession, not to “some unspecified amount of [controlled substance], that [he/she] did not currently possess, at some unspecified time in the future.” Latham, 874 F.2d at 861. However, the government need not prove that the defendant knew which particular controlled substance was involved. United States v. Hernandez, 218 F.3d 58, 65 (1st Cir. 2000); United States v. Kairouz, 751 F.2d 467, 468-69 (1st Cir. 1985) (affirming the instruction: “if defendant . . . ‘intend[ed] to distribute a controlled substance, it does not matter that . . . [he has] made a mistake about what controlled substance it happen[ed] to be’”) (alteration in original); see also United States v. Garcia-Rosa, 876 F.2d 209, 216 (1st Cir. 1989); United States v. Cheung, 836 F.2d 729, 731 (1st Cir. 1988). Similarly, the government is not required to prove that the defendant knew the specific weight or amount of the controlled substance involved. United States v. Collazo-Aponte, 281 F.3d 320, 325-26 (1st Cir. 2002).

(7) For a discussion on the issue of “possession,” see Akinola, 985 F.2d at 1109, Ocampo-Guarin, 968 F.2d at 1409-10, and United States v. Almonte, 952 F.2d 20, 23-24 (1st Cir. 1991). “[I]ntent is an element of constructive possession, which ‘exists when a person “knowingly has the power and intention at a given time to exercise dominion and control over an object, either directly or through others.”’” United States v. Paredes-Rodriguez, 160 F.3d 49, 54 (1st Cir. 1998). Inability to escape

with the contraband does not prevent a defendant from satisfying the power-to-exercise-control part of constructive possession. United States v. Van Horn, 277 F.3d 48, 54-55 (1st Cir. 2002).

4.21.841(a)(1)B Distribution of a Controlled Substance, 21 U.S.C. § 841(a)(1)

[Updated: 6/14/02]

[Defendant] is accused of distributing [controlled substance] on or about [date]. It is against federal law to distribute, that is, to transfer [controlled substance] to another person. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] on the date alleged transferred [controlled substance] to another person;

Second, that [he/she] knew that the substance was [controlled substance]; and

Third, that [defendant] acted intentionally, that is, that it was [his/her] conscious object to transfer the controlled substance to another person.

It is not necessary that [defendant] have benefitted in any way from the transfer.

If you find [defendant] guilty, you will also have to answer one or more questions concerning the quantity of the substance involved, which may affect the potential sentence.

Comment

(1) The statute defines “distribute” as meaning “to deliver,” 21 U.S.C. § 802(11), which in turn is defined as meaning “the actual constructive or attempted *transfer* of a controlled substance, whether or not there exists an agency relationship.” § 802(8) (emphasis added). Therefore, distribution includes both selling and buying. United States v. Castro, 279 F.3d 30, 34 (1st Cir. 2002) (rejecting defendant’s argument that facilitating the purchase of drugs did not constitute distribution). However, the court may refuse to instruct on the meaning of the term “distribute” “because it is within the common understanding of jurors.” United States v. Acevedo, 842 F.2d 502, 506-07 (1st Cir. 1988).

(2) “[D]eliver[y] or transfer [of] possession of a controlled substance to another person” constitutes distribution regardless of whether the transferor has “any financial interest in the transaction.” United States v. Morales-Cartagena, 987 F.2d 849, 852 (1st Cir. 1993). Thus, courts are in broad agreement that the mere sharing of narcotics can support a distribution charge. See, e.g., United States v. Corral-Corral, 899 F.2d 927, 936 n.7 (10th Cir. 1990); United States v. Ramirez, 608 F.2d 1261, 1264 (9th Cir. 1979). Distribution, however, does not include “the passing of a drug between joint possessors who simultaneously acquired possession at the outset for their own use.” United States v. Rush, 738 F.2d 497, 514 (1st Cir. 1984) (quoting United States v. Swiderski, 548 F.2d 445, 450-51 (2d Cir. 1977)) (overturning distribution conviction of husband and wife who jointly purchased and shared 4 grams of cocaine).

(3) “[I]ntent is an element of constructive possession, which ‘exists when a person “knowingly has the power and intention at a given time to exercise dominion and control over an object, either directly or through others.”’” United States v. Paredes-Rodriguez, 160 F.3d 49, 54 (1st Cir. 1998) (citations omitted).

(4) See Comment (2) to Instruction 4.21.841(a)(1) concerning instructions in enhanced penalty cases.

4.21.841(a)(1)C Manufacture of a Controlled Substance, 21 U.S.C. §§ 841(a)(1), 802(15)

[Updated: 6/14/02]

[Defendant] is accused of manufacturing [controlled substance] on or about [date]. It is against federal law to manufacture, that is to produce or prepare, [controlled substance]. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] manufactured [controlled substance];

Second, that [he/she] knew that the substance [he/she] was manufacturing was [controlled substance]; and

Third, that [defendant] acted intentionally, that is, that it was [his/her] conscious object to manufacture the controlled substance.

The term “manufacture” as it relates to this case means the production, preparation, propagation, compounding or processing of a controlled substance, either directly or indirectly or by extraction from substances of natural origin. The term “manufacture” includes the act of growing.

If you find [defendant] guilty, you will also have to answer one or more questions concerning the quantity of the substance involved, which may affect the potential sentence.

Comment

(1) The definition of manufacture includes other processes in addition to those listed above, *e.g.*, “independently by means of chemical synthesis or by a combination of extraction and chemical synthesis.” 21 U.S.C. § 802(15).

(2) Marijuana grown for personal use falls within the definition of “manufacture.” United States v. One Parcel of Real Property (Great Harbor Neck), 960 F.2d 200, 205 (1st Cir. 1992); see also 21 U.S.C. § 802(22) (“[P]roduction’ includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.”).

(3) “[I]ntent is an element of constructive possession, which ‘exists when a person “knowingly has the power and intention at a given time to exercise dominion and control over an object, either directly or through others.”’” United States v. Paredes-Rodriguez, 160 F.3d 49, 54 (1st Cir. 1998) (citations omitted).

(4) See Comment (2) to Instruction 4.18.841(a)(1) concerning instructions in enhanced penalty cases.

4.21.846

Conspiracy, 21U.S.C. § 846

[Updated: 6/14/02]

See Instruction 4.18.371(1).

In light of your verdict that [defendant] is guilty of the [drug crime], you must now also decide whether [he/she] should surrender to the government [his/her] ownership interest in certain property as a penalty for committing that crime. We call this “forfeiture.”

On this charge, federal law provides that the government is entitled to forfeiture, if it proves, by a preponderance of the evidence, that the property in question was proceeds of the crime or derived from proceeds of the crime.

Note that this is a different standard of proof than you have used for the [drug crime] charges. A “preponderance of the evidence” means an amount of evidence that persuades you that something is more likely true than not true. It is not proof beyond a reasonable doubt.

“Proceeds” are any property that [defendant] obtained, directly or indirectly, as the result of the crime.

If the government proves that property was acquired by [defendant] during the period of the [drug crime] or within a reasonable time after such period and there was no likely source other than the [drug crime] for the property, you may presume that the property is proceeds or traceable to the proceeds of the [drug crime]. You may presume this even if the government has presented no direct evidence to trace the property to drug proceeds, but you are not required to make this presumption. [Defendant] may present evidence to rebut this presumption, but [he/she] is not required to present any evidence.

While deliberating, you may consider any evidence admitted during the trial. However, you must not reexamine your previous determination regarding [defendant]’s guilt of the [drug crime]. All of my previous instructions concerning consideration of the evidence, the credibility of witnesses, your duty to deliberate together and to base your verdict solely on the evidence without prejudice, bias or sympathy, and the requirement of unanimity apply here as well.

On the verdict form, I have listed the various items that the government claims [defendant] should forfeit. You must indicate which, if any, [defendant] shall forfeit.

Do not concern yourselves with claims that others may have to the property. That is for the judge to determine later.

Comment

- (1) This forfeiture instruction can be used for most drug offenses. 21 U.S.C. § 853(a).

(2) The right to a jury trial on a criminal forfeiture count is not constitutional. Libretti v. United States, 516 U.S. 29 (1995). Instead, it is created by solely rule as follows:

Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

Fed. R. Crim P. 32.2(b)(4). The language of the Rule seems to contemplate a bifurcated proceeding, see also 2000 Advisory Committee Note. Pre-Libretti First Circuit caselaw left bifurcation to the trial judge's discretion. See, e.g., United States v. Desmarais, 938 F.2d 347, 349-50 (1st Cir. 1991); United States v. Maling, 737 F. Supp. 684, 705 (D.Mass. 1990), aff'd sub nom. United States v. Richard, 943 F.2d 115 (1st Cir. 1991); United States v. Saccoccia, 58 F.3d 754, 770 (1st Cir. 1995).

Note that some commentators question the vitality of Libretti after Appendi v. New Jersey, 530 U.S. 466 (2000). See Nancy J. King and Susan R. Klein, Essential Elements, 54 Vand. L. Rev. 1467, 1481 n.51 (2001) ("These factual showings [in forfeiture proceedings] arguably must be treated as elements after Appendi.") and David B. Smith, Prosecution and Defense of Forfeiture Cases § 14.03A, at 14-46 (2002) ("The unconstitutionality of Rule 32.2's scheme is patently obvious from Appendi."). The First Circuit has not addressed the issue, but the case law from other circuits holds that Libretti is not disturbed by Appendi as it applies to forfeiture proceedings. See, e.g., United States v. Cabeza, 258 F.3d 1256, 1257 (11th Cir. 2001) ("Because forfeiture is a punishment and not an element of the offense, it does not fall within the reach of Appendi"); United States v. Corrado, 227 F.3d 543, 550 (6th Cir. 2000) ("There is no requirement under Appendi . . . that the jury pass upon the extent of a forfeiture"); United States v. Powell, 38 Fed. Appx. 140, 141 (4th Cir. 2002) ("Because forfeiture is a punishment rather than an element of the offense, Appendi is not implicated.").

(3) Rule 32.2 seems to indicate that the question of a money judgment is for the court only, and never for the jury. The text of 32.2(b)(1) divides its description of the court's role: "If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant has to pay."

Fed. R. Crim. P. 32.2(b)(1) (2002) (emphasis added). The jury's role is limited to the nexus determination for property: "Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant," Fed. R. Crim. P. 32.2(b)(4). There is no reference to the jury's role in a money judgment.

The advisory committee notes for the 2000 adoption support this distinction. After explicitly taking no position on the correctness of allowing money judgments (the First Circuit permits them, see, e.g., United States v. Candelaria-Silva, 166 F.3d 19, 42 (1st Cir. 1999)), the notes go on to prescribe different decisional rules for the different kinds of judgments: when forfeiture of property is asked for, the court determines the nexus; when a personal money judgment is asked for, the court determines the amount. Fed. R. Crim. P. 32.2(b)(1), advisory committee's note. Then, in discussing subdivision (b)(4), the notes state, "The only issue for the jury in such cases would be whether the government has

established the requisite nexus between the property and the offense.” Fed. R. Crim. P. 32.2(b)(4), advisory committee’s note (emphasis added). No mention is made of a role for the jury with respect to personal money judgments.

This distinction has been noted by some commentators, see, e.g., Smith, *supra*, at 14-48 (“There is no right to a jury trial of the forfeiture issue if . . . the government seeks a personal money judgment instead of an order forfeiting specific assets”) (emphasis supplied), but has not been dealt with by the courts. Although there is room for some uncertainty, this seems to be the best interpretation of the rule.

(4) The standard of proof is preponderance of the evidence. United States v. Rogers, 102 F.3d 641, 648 (1st Cir. 1996) (“criminal forfeiture, being a penalty or sanction issue under 853, is governed by the same preponderance standard that applies to all other sentencing issues.”). Note the possible Apprendi issue in the preceding comments.

(5) The rebuttable presumption comes from 21 U.S.C. § 853(d).

(6) The rights of third parties are determined in an ancillary proceeding before the judge without a jury. 21 U.S.C. § 853(n)(2); 2000 Advisory Committee Note to Rule 32.2(b)(4).

[Defendant] is charged with federal income tax evasion. It is against federal law intentionally to evade or defeat the assessment or payment of federal income tax. For you to find [defendant] guilty of this crime, the government must prove the following things beyond a reasonable doubt:

First, that [defendant] owed substantially more federal income tax for the year[s] [] than was indicated as due on [his/her] income tax return;

Second, that [defendant] intended to evade or defeat the assessment or payment of this tax; and

Third, that [defendant] willfully committed an affirmative act in furtherance of this intent.

Fourth, that [defendant] did not have a good-faith belief that [he/she] was complying with the provisions of [specific provision]. A belief may be in good faith even if it is unreasonable.]

A person may not be convicted of federal tax evasion on the basis of a willful *omission* alone; he or she also must have undertaken an affirmative act of evasion. The affirmative act requirement can be met by [the filing of a false or fraudulent tax return that substantially understates taxable income or by other affirmative acts of concealment of taxable income such as keeping a double set of books, making false entries or invoices or documents, concealing assets, handling affairs so as to avoid keeping records, and so forth].

[Defendant] acted “willfully” if the law imposed a duty on [him/her], [he/she] knew of the duty, and [he/she] voluntarily and intentionally violated that duty. Thus, if [defendant] acted in good faith, [he/she] cannot be guilty of this crime. The burden to prove intent, as with all other elements of the crime, rests with the government. This is a subjective standard: what did [defendant] honestly believe, not what a reasonable person should have believed. Negligence, even gross negligence, is not enough to meet the “willful” requirement.

Comment

(1) This instruction covers two distinct felony crimes under § 7201. A defendant may be charged with a “willful attempt to evade or defeat” either “the ‘assessment’ of a tax” or “the ‘payment’ of a tax.” United States v. Hogan, 861 F.2d 312, 315 (1st Cir. 1988) (citing Sansone v. United States, 380 U.S. 343, 354 (1965)). “The elements of both crimes are the same.” Id.

(2) The felony of tax evasion under § 7201 is distinguishable from the misdemeanor of failing to file a tax return under § 7203 in that it requires an affirmative “attempt to evade or defeat taxes.” Sansone, 380 U.S. at 351; see also United States v. Waldeck, 909 F.2d 555, 557, 559 (1st Cir. 1990). “A mere willful failure to pay a tax” is not sufficient. Sansone, 380 U.S. at 351.

(3) Although § 7201 does not contain an explicit “substantiality” requirement, most circuits require the government to prove that the amount of tax evaded was substantial. See, e.g., United States v.

Gonzales, 58 F.3d 506, 509 (10th Cir. 1995); United States v. Romano, 938 F.2d 1569, 1571 (2d Cir. 1991); United States v. Goodyear, 649 F.2d 226, 227 (4th Cir. 1981); United States v. Burkhart, 501 F.2d 993, 995 (6th Cir. 1974); McKenna v. United States, 232 F.2d 431, 436 (8th Cir. 1956). But see United States v. Marashi, 913 F.2d 724, 735 (9th Cir. 1990). The First Circuit appears to follow this majority approach. See United States v. Sorrentino, 726 F.2d 876, 879, 880 n.1 (1st Cir. 1984) (showing of substantiality required under net-worth method of proof) (citing United States v. Nunan, 236 F.2d 576 (2d Cir. 1956) (showing that a substantial tax was evaded required generally in § 7201 cases)); United States v. Morse, 491 F.2d 149, 153 n.3 (1st Cir. 1974) (showing of a substantial discrepancy required under bank-deposits method of proof). But the Government need not prove the exact amount due. Sorrentino, 726 F.2d at 880 n.1.

(4) “Willfulness” is an element of any crime under 26 U.S.C. §§ 7201-07. That term has been defined in the context of criminal tax cases as “requir[ing] the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.” Cheek v. United States, 498 U.S. 192, 201 (1991); see also United States v. Olbres, 61 F.3d 967, 970 (1st Cir. 1995). Mistake, negligence and gross negligence are not sufficient to meet the willfulness requirement of these tax crimes. Hogan, 861 F.2d at 316; United States v. Aitken, 755 F.2d 188, 191-93 (1st Cir. 1985).

(5) Cheek also held that the government has the burden of “negating a defendant’s claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws.” 498 U.S. at 202. A defendant has a valid good-faith defense “whether or not the claimed belief or misunderstanding is objectively reasonable.” Id.; see also Aitken, 755 F.2d at 190-92. However, a belief that the tax statutes are unconstitutional is “irrelevant to the issue of willfulness.” Cheek, 498 U.S. at 206.

(6) The court may add an instruction on conscious avoidance “if a defendant claims a lack of knowledge, the facts suggest a conscious course of deliberate ignorance, and the instruction, taken as a whole, cannot be misunderstood as mandating an inference of knowledge.” United States v. Littlefield, 840 F.2d 143, 147 (1st Cir. 1988). Such an instruction does not impermissibly lessen the government’s burden of proof because “it goes to *knowledge* and not to willfulness.” Hogan, 861 F.2d at 316 (emphasis added).

4.26.7203**Failure to File a Tax Return, 26 U.S.C. § 7203**

[Updated: 2/12/03]

[Defendant] is charged with willful failure to file a tax return for the year[s] [_____]. It is against federal law to engage in such conduct. For you to find [defendant] guilty of this charge, the government must prove each of the following three things beyond a reasonable doubt:

First, that [defendant] was required to file an income tax return for the year[s] [_____];

Second, that [defendant] failed to file an income tax return for the year[s] in question; and

Third, that [defendant] acted willfully.

To act “willfully” means to violate voluntarily and intentionally a known legal duty to file, not to act as a result of accident or negligence.

Comment

(1) Failure to file a tax return under § 7203 is a misdemeanor. In the appropriate circumstances, the charge can be used as a lesser included offense for the crime of willful tax evasion under § 7201. See Spies v. United States, 317 U.S. 492, 497-99 (1943). “Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.” Id. at 499.

(2) See Comment to Instruction 4.26.7201 (Income Tax Evasion) for a discussion of willfulness, good faith and deliberate ignorance in the context of tax crimes. See also United States v. Turano, 802 F.2d 10, 11 (1st Cir. 1986) (stating that trial court’s instruction on good-faith defense did not “improperly inject[] an objective element into the subjective willfulness inquiry”); United States v. Sempos, 772 F.2d 1, 2 (1st Cir. 1985) (“Financial or domestic problems . . . do not rule out willfulness. . .”).

[Defendant] is charged with willfully filing a false federal income tax return. It is against federal law to engage in such conduct. For you to find [defendant] guilty of this charge, the government must prove each of the following things beyond a reasonable doubt:

First, that [defendant] signed a federal income tax return containing a written declaration that it was being signed under the penalties of perjury;

Second, that [defendant] did not believe that every material matter in the return was true and correct; and

Third, that [defendant] willfully made the false statement with the intent of violating [his/her] duty under the tax laws and not as a result of accident, negligence or inadvertence.

A “material” matter is one that is likely to affect the calculation of tax due and payable, or to affect or influence the IRS in carrying out the functions committed to it by law, such as monitoring and verifying tax liability. A return that omits material items necessary to the computation of taxable income is not true and correct.

Comment

(1) Materiality is a question for the jury, and the definition of materiality here comes largely from United States v. DiRico, 78 F.3d 732, 735-36 (1st Cir. 1996). The standard is objective. United States v. Romanow, 509 F.2d 26, 28 (1st Cir. 1975).

(2) See Comment to Instruction 4.26.7201 (Income Tax Evasion) for a discussion of willfulness, good faith and deliberate ignorance in the context of tax crimes. See also United States v. Pomponio, 429 U.S. 10, 11-13 (1976); United States v. Bishop, 412 U.S. 346, 360 (1973); United States v. Drape, 668 F.2d 22, 26 (1st Cir. 1982) (“Intent may be established where a taxpayer ‘chooses to keep himself uninformed as to the full extent that [the return] is insufficient.’” (quoting Katz v. United States, 321 F.2d 7, 10 (1st Cir. 1963)) (alteration in original)).

(3) The defendant’s signature on the tax return is sufficient to support a finding by the jury that he or she read the return and knew its contents. United States v. Olbres, 61 F.3d 967, 971 (1st Cir. 1995); Drape, 668 F.2d at 26; Romanow, 509 F.2d at 27.

(4) The instruction can be modified to apply to a willful omission of material facts on a tax return. See Siravo v. United States, 377 F.2d 469, 472 (1st Cir. 1967) (“[A] return that omits material items necessary to the computation of income is not ‘true and correct’ within the meaning of section 7206.”).

4.31.5322 Money Laundering—Illegal Structuring, 31 U.S.C. §§ 5322, 5324

[Updated: 6/14/02]

[Defendant] is charged with violating that portion of the federal money laundering statute that prohibits structuring a transaction to avoid reporting requirements. It is against federal law to structure transactions for the purpose of evading the reporting requirements. For [defendant] to be convicted of this crime, the government must prove the following things beyond a reasonable doubt:

First, [defendant] structured or assisted in structuring [attempted to structure or assist in structuring] a transaction with one or more domestic financial institutions; and

Second, [defendant] did so with the purpose of evading the reporting requirements of federal law affecting the transactions.

Federal law requires that transactions in currency of more than \$10,000 be reported by a financial institution to the Internal Revenue Service.

A [withdrawal; deposit; etc.] from a [_____] is a financial transaction.

Comment

(1) Congress deleted the statutory willfulness requirement for structuring offenses in response to the Supreme Court's decision in Ratzlaf v. United States, 510 U.S. 135, 136-37 (1994) (holding that the government must prove not only the defendant's purpose to evade a financial institution's reporting requirements, but also the defendant's knowledge that structuring itself was unlawful). See Act of Sept. 23, 1994, Pub. L. No. 103-325, § 411, 108 Stat. 2160, 2253, codified at 31 U.S.C. §§ 5322(a) & (b), 5324(c); see also United States v. Hurley, 63 F.3d 1, 14 n.2 (1st Cir. 1995). The amendments restore:

the clear Congressional intent that a defendant need only have the intent to evade the reporting requirement as the sufficient mens rea for the offense. The prosecution would need to prove that there was an intent to evade the reporting requirement, but would not need to prove that the defendant knew that structuring was illegal. However, a person who innocently or inadvertently structures or otherwise violates section 5324 would not be criminally liable.

H.R. Conf. Rep. No. 652, 103d Cong., 1st Sess. 147, 194 (1994), reprinted in 1994 U.S.S.C.A.N. 1977, 2024. (For criminal acts after September 23, 1994, the amendments also moot the debate over whether United States v. Aversa, 984 F.2d 493 (1st Cir. 1993), vacated and remanded, 510 U.S. 1069 (1996), which had held that "reckless disregard" was sufficient to satisfy the now defunct willfulness requirement, survived Ratzlaf. See United States v. London, 66 F.3d 1227, 1245 (1st Cir. 1995) (Torruella, J., dissenting)).

(2) The requirements for currency transaction reports are set forth at 31 U.S.C. § 5313; 31 C.F.R. § 103.22 (1997).

4.46.1903 Possessing a Controlled Substance On Board a Vessel Subject to United States Jurisdiction With Intent to Distribute, 46 U.S.C. App. § 1903

[Updated: 6/14/02]

[Defendant] is charged with illegally possessing [controlled substance] while on board a vessel subject to United States jurisdiction, intending to distribute it to someone else. It is against federal law to have [controlled substance] in your possession while on board a vessel subject to United States jurisdiction, with the intention of distributing all or part of the [controlled substance] to someone else.

I have determined that [name of vessel] was subject to United States jurisdiction on [date charged]. For you to find [defendant] guilty of this crime you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that on the date charged [defendant] was on board [name of vessel] and at that time possessed [controlled substance], either actually or constructively;

Second, that [he/she] did so with a specific intent to distribute the [controlled substance] over which [he/she] had actual or constructive possession;

Third, that [he/she] did so knowingly and intentionally.

The term “possess” means to exercise authority, dominion or control over something. The law recognizes different kinds of possession.

[“Possession” includes both actual and constructive possession. A person who has direct physical control of something on or around his or her person is then in actual possession of it. A person who is not in actual possession, but who has both the power and the intention to exercise control over something is in constructive possession of it. Whenever I use the term “possession” in these instructions, I mean actual as well as constructive possession.]

[“Possession” [also] includes both sole possession and joint possession. If one person alone has actual or constructive possession, possession is sole. If two or more persons share actual or constructive possession, possession is joint. Whenever I have used the word “possession” in these instructions, I mean joint as well as sole possession.]

Comment

(1) There is First Circuit caselaw dealing with jury instructions as to the jurisdictional part of the statute. See United States v. Saavedra, 250 F.3d 60, 64-65 (1st Cir. 2001) (defendant’s knowledge of jurisdiction not required); United States v. Santana-Rosa, 132 F.3d 860, 865 (1st Cir. 1998) (holding that the court must give an instruction defining customs waters). These cases, however, interpret the statute before its 1996 amendment, which added the following language:

Jurisdiction of the United States with respect to vessels subject to this chapter is not an element of any offense. All jurisdictional issues

arising under this chapter are preliminary questions of law to be determined solely by the trial judge.

46 U.S.C. App. § 1903(f) (1996). The effect was “to remove from the jury and confide to the judge” this issue. United States v. Gonzalez, 311 F.3d 440, 443 (1st Cir. 2002).

(2) See Comment (2) to Instruction 4.18.841(a)(1) concerning instructions in enhanced penalty cases.

